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QUESTIONS PRESENTED

1. Is there a conflict between the District Court's decisions, as affirmed by the Court of Appeals for the Second Circuit, with regard to admiralty jurisdiction over a claim of general agent for shoreside services, and the decisions of the Fifth and Ninth Circuits?

2. Should this Court overrule or limit its opinion in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), which denied admiralty jurisdiction to an agent, in order to benefit Exxon and would such action by this Court secure any practical gain?

LIST OF PARTIES

In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Respondents annexed a list of the corporate parents and subsidiaries as Appendix 1a to its Opposition to a Writ of Certiorari. A revised list has been filed with the Clerk's Office.

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Q. You personally had conversations with Hakim in London?

A. Yes, I did.

Q. Sir, I show you another document and I ask you if you can identify that.

A. This was several days later. Mr. Hakim in London called me to tell me what the status of his payment problems were with Waterman.

Do you want me to go through it line by line?

MR. PARE: First let's please mark it as Exxon Exhibit 10.

(A. telex was so marked as Exxon Exhibit 10 for identification.)

Q. Before we get into that one, though, the previous exhibit, you said you had informed Hakim with respect to the JACKSON?

A. Yes.

Q. Did there come a time you made any decision with respect to the HOOPER, WILLIAM HOOPER?

A. Yes.

Q. That had been projected for delivery on October 25th?

A. Yes. Subsequent to that the salespeople and the treasury people agreed to take the WILLIAM HOOPER also, and we passed that information to Mr. Hakim and also made a nomination.

Q. That was done approximately in the same manner or in a different manner?

A. Same manner.

Q. Done before the delivery took place?

A. Yes.

Q. With respect to Exhibit 10 —

A. Yes.

Q. — could you briefly describe what that represents?

A. Again, that was the phone call from Mr. Hakim in London telling us that Waterman had paid on October 20th, a million fifty-two thousand dollars covering two deliveries, one of which was due on the 5th or was fifteen days late, and the other one due on the 11th of October which was nine days late.

Q. Those were deliveries made directly by AMOCO

[Excerpt of deposition of James E. Sharkey attached as Exhibit 16 to Paré Affidavit filed 5/31/88]

October. And AMOCO came back to Exxon and asked us did we take a direct role in the placement of the Waterman orders.

Q. What do you mean by "direct role"? Did you talk to somebody at AMOCO?

A. No. The conversation was between a gentleman named Hakim and Mr. Matters.

Q. And how did you find out about this?

A. Since I was a salesman, I was made aware that this conversation had taken place.

Q. I'm, sorry. I didn't mean to interrupt you. What was the gist of this conversation?

A. AMOCO wanted to know or actually asked Exxon to revert back to the old procedure where we physically placed the nominations and in effect accepted the credit responsibility for the payment of the oil. And we were somewhat concerned about that turn of events. It would have effectively meant that we would be taking on an added financial burden by assuming this role.

Q. You were going to guarantee the —

A. We would purchase for resale, yes.

Q. Pardon me?

A. We would have to purchase for resale, as we would in the days prior to Waterman going directly to AMOCO.

Q. When did this happen?

A. I can't be specific; but I would say it was in the very early days of October 1983.

Q. Did you make any notes with regard to this?

A. No, not that I'm aware of.

Q. Okay. Did you talk to anyone at Waterman with regard to this?

A. Oh, yes. I spoke with Bill Ryan and — let's see how to phrase it — he was aware, of course, that AMOCO were looking to have the relationship revert back to Esso, Exxon, and I had expressed to Bill that we weren't all that enthused about doing it but that we had an open mind.

Q. Now, did there come a time when a specific vessel was involved, the bunkering of a specific vessel?

A. Yes. Around mid-October, Mr. Hakim of AMOCO basically called Mr. Matters and said that they were reluctant to supply this particular ship, the Waterman vessel, in light —

Q. Do you recall what vessel it was?

A. I think it was the STONEWALL JACKSON.

Q. Had you been involved with the nomination for that ship?

A. Yes.

Q. When had that taken place?

A. Waterman were of the habit of placing their nomination well in advance so that nomination could have been placed with AMOCO at least a month prior to the physical requested loading date, so I can't recall specifically when it was placed but well in advance of the loading date.

Q. And that would have followed the procedure we spoke of before, with the form having been filled out, AMOCO would have been advised by the order and shipping room —

A. Yes.

Q. — and then there would have been a cancellation on your internal —

A. Mariner system.

Q. — Mariner system. Do you have available to you today the form that you filled out with regard to the STONEWALL JACKSON for mid-October 1983?

A. I saw the form yesterday. I don't know if we have it here with us today.

MR. MONTBACH: Counsel?

MR. PARÉ: No, we don't.

Q. Where did you see that form?

A. It was part of the exhibits of Ed Matters and Rudzki.

(Witness confers with counsel.)

Q. You say you thought you saw it yesterday?

A. I thought I saw it, yes. Maybe I just — we kept thousands of these damn things so it's possible that —

MR. MONTBACH: Well, I call for production of that form, if it exists, from counsel, whether or not it was in the boxes of documents. I don't have it. It hasn't been marked in a prior deposition. I would request that it be produced.

Q. With regard to the STONEWALL JACKSON, when the nomination was made, it would have gone into the Mariner

system and then immediately been cancelled from the MARINER system; is that correct?

A. Yes.

Q. Then something occurred, and Mr. Hakim spoke to Mr. Matters and said, around October — is it around October 19th? Does that date sound familiar to you?

A. Prior to the 19th, I think.

Q. Prior to the 19th. What happened then, to your knowledge?

A. That Matters came down to the operational side of the marine sales department and made us aware of the conversation he had with Mr. Hakin and that Hakim, AMOCO, were reluctant to deal on a one-to-one basis with Waterman for future deliveries.

Q. When you say "for future," does that include the STONEWALL JACKSON?

A. Yes.

Q. When you say "reluctant," did they refuse or —

A. I'm not sure whether they flat-out said, "We refuse," but there was a strong overtone that they were not willing to — not willingly willing to go ahead with their arrangement. Almost to the point where, I think, if we didn't accept, they were not going to make the delivery.

Q. Why did Mr. Matters come down to talk to you about it?

A. He had the relationship with Mr. Hakim at AMOCO, but it wasn't Eddie's jurisdiction to make the decision whether in fact we would revert back to the old procedure. He was just

informing us of the fact that AMOCO wished to go back to the old methodology.

Q. Okay. And whose jurisdiction was it to make that decision?

A. At the time, the manager of marine sales was a Mr. Pierce who had replaced Mr. DeWitt. And my immediate boss was a Mr. Sharp, who had replaced Harry Barr.

Q. He was assistant manager?

A. Yes.

Q. This was in October 1983?

A. Yes.

Q. Is Mr. Pierce still employed by Exxon?

A. He is, yes.

Q. And Mr. Sharp?

A. No. He's resigned.

Q. So Mr. Matters advised you of this message from Mr. Hakim?

A. Yes.

Q. And what did you do, if anything?

A. Well, there was a meeting called with the treasurer's group, the rationality being that if we made the decision to take on these deliveries, the responsibilities for these deliveries, we'd have to increase our credit exposure with Waterman, so we have to have permission from the treasurer's group.

Q. Is that Mr. Rudzki?

A. Mr. Rudzki, yes.

Q. Who was at the meeting? Were you there?

A. I don't know if you could refer to it as a specific meeting; but I was involved in a series of meetings, so I don't know if you're talking about a specific, meeting; but there were, you know, every day, there seemed to be some conversation or other regarding Waterman, what do we do about them; so I can't pin it down to a specific site or time period. But I was involved in discussions, ongoing discussions.

Q. With Mr. Pierce and Mr. Sharp?

A. Yes.

Q. And Mr. Rudzki?

A. And Mr. Rudzki; yes.

Q. And did you finally reach a consensus as to what to do?

A. We decided that we would supply on a direct basis.

Q. From then on or for this one vessel?

A. On a one-by-one ship basis, case-by-case.

Q. Okay. Did you talk to anyone at Waterman with regard to this?

A. Yes. I had called Bill Ryan to tell him that we were made aware of the fact that Mr. Hakim at AMOCO did not want to continue the direct relationship with Waterman. Bill acknowledged that such a conversation had in fact taken place, and he was relieved to know that Exxon was willing to buy on his behalf directly from AMOCO and then resell to him.

Q. When did this conversation take place with Mr. Ryan?

A. I'd have to guess somewhere around the middle of October, very close to the loading of the STONEWALL JACKSON.

Q. Did you make any notes with regard to your conversation with Mr. Ryan?

A. No. They were all verbal.

Q. What then happened?

A. I'm not specifically sure; but we reinstated the nominations at Jiddah directly with AMOCO. AMOCO were now aware of the fact that it was Exxon placing the nominations rather than Waterman.

Q. What do you mean by, you "reinstated"

***

agreement, I don't think so. But that's something we can discuss —

MR. PARÉ: Let's take it up at the end. The agreement was that we wouldn't have to duplicate discovery and that's what we're being asked to do now.

MR. MONTBACH: I don't think so. But —

Q. — all right. Now, you stated that the bunkering of the vessel would be on a case-by-case basis at that time; is that right?

A. Yes.

Q. And did there come a time when you then had to consider a second vessel for bunkering at Jiddah?

A. Yes. These — the nominations had already been in the system, you know, presented to us by Waterman at an earlier date, so yes, there was a subsequent loading.

Q. During this time period — well, when was the subsequent loading?

A. I believe it was within two or three days of the STONEWALL JACKSON. It was the —

Q. The WILLIAM HOOPER?

A. The WILLIAM HOOPER, yes.

Q. I'll represent to you that the WILLIAM HOOPER was bunkered on October 26, 1983. I'm sure your counsel will confirm that fact.

MR. PARE: Is that a concession?

MR. MONTBACH: I will concede that there is a bunker delivery receipt marked as Exhibit, Central Gulf number 12-A and 12-B for the WILLIAM HOOPER, October 26, 1983.

MR. PARE: Are you conceding that it was delivered on that date?

MR. MONTBACH: On the assumption that it was, sir.

Q. To your knowledge, were other Waterman vessels bunkered at other ports pursuant to the contract between Exxon and Waterman during this whole time period that we're talking about?

A. Yes.

MR. PARE: I kind of missed the question. If I could just hear it.

(Record read.)

Q. Were those being handled on a case-by-case basis?

A. No.

Q. The amount of the value of the bunkers provided on those vessels obviously impacted on their credit limit; is that correct? Waterman's credit limit.

A. Sure.

Q. But there were no discussions with regard to those vessels?

A. No.

Q. Now, you said that there did come a time when the WILLIAM HOOPER came up for bunkering; is that correct?

A. That's correct.

Q. And what happened, as far as you recall, with regard to that vessel?

A. We had made the commitment to supply the STONEWALL JACKSON and we also committed to supply the WILLIAM HOOPER.

Q. When did you commit to supply the WILLIAM HOOPER?

A. As I say, it was on a case-by-case basis. It had to be days prior to the actual loading. I can't be specific on the date that we approved it.

Q. Was the commitment made to supply the WILLIAM HOOPER made in the same day as the commitment

[Excerpt from the deposition of Adam V. Rudski, attached as Exhibit 17 to Paré Affidavit filed 5/31/88]

A. No, not to my knowledge, no.

Q. Those words are your words?

A. Those are my words.

Q. Now, turn to the next paragraph.

A. Yes.

Q. And you say accepting this proposal would lead to a high level — I am sorry, I will read the whole thing to you: Accepting this proposal (in itself a sign that a third party was losing confidence in Waterman) would have led to a level of exposure which we thought would be unacceptable in the light of Waterman's first half 1983 results; right?

A. Right.

Q. You did not want to entertain the proposal?

A. No. We were not too keen on extending additional credit to a company that was in difficulty.

Q. Understandable. So did you reject that proposal?

A. No. We did not reject the proposal outright, because we did supply maybe — we made two or three deliveries. I don't recall off-hand. I think two in Jedda in the period of October 15 and December 1.

Q. Then you go on to say, however in mid October we were abruptly informed by AMOCO that they would no longer supply Waterman.

A. That's correct.

Q. How did they abruptly — what was the word — inform you?

A. Over the telephone.

Q. Was this the same telephone conversation?

A. There were a number of telephone conversations, I am sure.

Q. Over what period of time?

A. Over a period of two or three days, and naturally a request from Arabian Marine or a statement from Arabian Marine that they will no longer supply was a dilemma for us to decide whether we will let the vessel be stranded in Jedda or whether we make the delivery. That required discussion with senior management.

Q. Now, who spoke in these telephone conversation on behalf of Arabian maritime?

A. Who is the individual?

Q. Yes.

A. Mr. Matters.

Q. Spell that please.

A. M a t t e r s .

Q. Where is he based?

A. He is in Floral Park, New Jersey.

Q. That's on your side, Exxon?

A. Yes.

Q. Who spoke on behalf of Arabian Maritime?

A. I believe Mr. Hakim.

Q. Have you spoken to Mr. Matters about these conversations?

A. Yes, Mr. Matters was the one that advised me and the commercial department that Arabian Marine will no longer supply Waterman.

Q. Did Mr. Matters keep notes of his conversations?

A. I don't know. That's what I said I don't know and I will be very happy to find out for you.

Q. Next sentence, you were concerned that Exxon's refusal to supply Waterman with only a days notice would signal such a series problem to other suppliers and creditors that it might precipitate a financial crisis?

A. Right.

Q. You were going to stand behind Waterman in Jedda?

A. We did not want to let the ship be stranded, because there was no supplier.

Q. So we therefore decided to make the imminent deliveries in Jedda and to continue to supply Waterman on a case by case basis.

Do you have any memorandum or notes reflecting that decision?

A. Only one, I believe that was prepared by Mr. Sharkey that we have already entered into this, that we have reviewed it with Waterman and agreed to take some deliveries.

MR. O'BRIEN: I don't remember seeing that.

A. I may be confusing this.

MR. PARÉ: The witness is referring to Central Gulf Exhibit 6.

Q. Is Sharkey in there?

A. That was written by Jim Sharkey and documents the various visits with Waterman and the things that we were deciding or not deciding to do. But —

Q. I don't think that's the answer to my question. I can't remember my question, but I don't think that's the answer to it.

A. I think you asked — God, maybe we should start again.

(Testimony read)

Q. Now, in the last section of that memo, outlook, you again referred to the 780 thousand dollars on a delivery of a ship which Waterman chartered from Central Gulf Lines?

A. Right.

Q. That's in accordance with prior draft memorandum?

A. That's correct.

Q. When you decided to make these standby or the one

Unites States Bankruptcy Court
Southern District of New York

In re:	:	
Waterman Steamship Corporation,	:	In proceedings for reorganization under Chapter 11 Case No. 83 B 11732 (HCB)
Debtor,	:	

City of Jeddah)
) SS:
Country of Saudi Arabia)

Camille A. Hakim, being du.y sworn, deposes and says:

1. I am the Manager of Arabian Marine Operating Company ("Arabian Marine"), a Company engaged in the delivery of bunkers to vessels.

2. By arrangement with Exxon International Company, a Division of Exxon Corporation ("Exxon") Arabian Marine delivers bunkers to Exxon's customers' vessels calling at Jeddah, Saudi Arabia when requested to do so by Exxon. In October, 1983 Arabian Marine was requested by Exxon to do so for the William Hooper ("The Vessel"), delivery was made on October 26, 1983 of 4,242.47 Metric Tons of bunkers by Arabian Marine in the Port of Jeddah.

3. I have been told there is an issue as to whether any Arabian Marine Personnel involved with this delivery were aware of the existence of a Charter Party with respect to the Vessel and/or a purported provision in such Charter Party prohibiting Liens arising against the vessel in connection with

the furnishing of bunkers or other supplies or services to the vessel. I have reviewed this matter with the Master, Mr. Yoo Gwang Duk, the Chief Officer, Mr. Kim Hae Song and the 1st Engineer, Mr. Yuk Jang Soo all of the M/T "HABIBA" and Master, Mr. Yun Kil Nam, the Chief Officer, Mr. Yoo Myung Tek and the Foreman, Mr. Chu Dae Se of the M/T "ZEINA", the two barges which delivered the bunkers to the Vessel and find that none of them was aware either of the existence of a Charter Party or a Charter party provision as just described. In addition, they informed me that none of the other members of the crews were aware of any such Charter Party or Charter Party provision and that the other members of the barges crews had no contact with the crew of the Vessel.

4. I have been informed that it is claimed that a Charter Party and/or a "No Lien" notice was posted on the bridge of the Vessel. The six men identified above have informed me that the bunkers in question were supplied by bunker barges, that the bunker barges pulled alongside the Vessel, the Vessel's crew lifted the barges' bunker delivery hoses aboard the Vessel and thereafter attached the hoses to the Vessel's bunker fuel manifold. No one from the bunker barges went onboard the Vessel before, during or after this operation nor was it necessary for them to do so.

5. To the best of my knowledge, no other personnel of Arabian Marine ever had any notice or knowledge of any Charter Party or any Charter Party provision as described above.

6. To the best of my knowledge, the foregoing is also tru with respect to any other Vessels bunkered by Arabian Marine on Exxon's behalf for the account of Waterman Steamship Corporation.

Respectfully submitted,

/s/ Camille A. Hakim

Camille A. Hakim

Manager,
Arabian Marine Operating Co.

Sworn to before me this
2nd Day of June, 1984.

Kingdom of Saudi Arabia :
Western Province : ss.
City of Jidda :
Embassy of the United States of America

Before me, Louis P. Russell Consul of the United States of America at Jidda, Saudi Arabia, duly commissioned and qualified, personally appeared Camille A. Hakim Who subscribed and sworn to the above before me this 2nd day of June 1984.

/s/ Louis P. Russell
LOUIS P. RUSSELL
CONSUL OF THE UNITED STATES OF AMERICA

SEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,	
Plaintiff,	: 86 Civ. 9445 (WCC)
-against-	
CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*,	: AFFIDAVIT : OF ADAM : RUDZKI : IN SUPPORT OF : MOTION FOR : SUMMARY : JUDGMENT
Defendants.	

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MORRIS)

ADAM V. RUDZKI, being duly sworn, deposes and states:

1. I am the Credit Manager of Exxon Company, International, an unincorporated division of Exxon Corporation (hereinafter "Exxon"). I formally acted as Chairman of the Creditors' Committee in the Chapter XI Petition of Waterman Steamship Corporation (hereinafter "Waterman").

2. Attached as Exhibit "1" are copies of the Exxon checks, transfer instructions and debits to Exxon's account, evidencing payment by Exxon to Arabian Marine Operating Co. Ltd., via its Tokyo bank, for fuel delivered to the STONEWALL

JACKSON and WILLIAM HOOPER at Jeddah, Saudi Arabia on or about October 19 and October 26, 1983, in the amounts of $541,653.39 and $749,229.20 for deliveries to the STONEWALL JACKSON and WILLIAM HOOPER, respectively. (The delivery to the WILLIAM HOOPER at Jeddah is hereinafter referred to as the "Jeddah Delivery"; no claim is being asserted herein with respect to the STONEWALL JACKSON delivery).

3. Up to and including December 1, 1983 when Waterman filed its Chapter XI Petition, Waterman had not paid for the Jeddah Delivery. In addition, up to and including this time, Waterman had not paid for a marine gas oil delivery made to that Vessel at New York on or about October 7, 1983 in the amount of $13,241.63 (hereinafter the "New York Delivery").

4. Prior to Exxon's experience with Waterman in or about October, 1983, Waterman had an excellent payment history with Exxon and had regularly paid its bills for bunkers within the established credit periods.

5. Following the Waterman reorganization, Exxon received $86,321.39 in cash on account of the New York and Jeddah Deliveries. In addition, Exxon received 20,267 shares of Series "A" Waterman stock and 27,023 shares of Series "B" Waterman stock on account of the New York and Jeddah Deliveries. Dividends on these shares have amounted to $40,534.00 and $23,239.78 respectively.

/s/ Adam V. Rudzki

Sworn to before me this
11th day of May, 1988

/s/Beverly C. Koehler
Notary Public

[Notary Stamp]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION,	
Plaintiff,	86 Civ. 9445 (WCC)
-against-	
CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*,	AFFIDAVIT OF JAMES E. SHARKEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Defendants.	

STATE OF NEW JERSEY)
) ss.:
COUNTY OF MORRIS)

JAMES E. SHARKEY being duly sworn, deposes and states:

1. I am a marine salesman for Exxon Company, International (formally known as Exxon International Company), an unincorporated division of Exxon Corporation (hereinafter "Exxon"). I was the account representative who handled the sale by Exxon to Waterman Steamship Corporation (hereinafter "Waterman") of the marine gas oil and bunker fuel oil referred to herein.

2. Waterman has been one of Exxon's accounts for over 40 years. So far as I am aware, Exxon has been the sole source

of worldwide bunker supplies to Waterman over this period, with the limited exception of the short time at Jeddah, Saudi Arabia, referred to herein. Attached as Exhibits "1" - "3" are the Waterman/Exxon contracts for the sale of bunker fuel oil covering 1981, 1982 and 1983, respectively. Exhibit "3" is the Waterman/Exxon contract for the sale of bunker fuel oil in issue (sometimes hereinafter referred to as the "Exxon/Waterman Fuel Oil Contract"). The main terms of these contracts are, however, the product of negotiation each year between Exxon and Waterman. I was involved in the negotiation of the 1983 contract (Exhibit "3"). The prices and volumes contained in Exhibit "3" were those agreed to with Waterman. This contract was prepared by me and mailed to Waterman. Fuel deliveries made by Exxon to Waterman during 1983 were made and billed in accordance with this contract.

3. When Waterman was in need of bunker fuel oil or marine gas oil, someone at Waterman's office in New York would telephone usually either myself or Fred Ehrhardt at Exxon in New York (now New Jersey) and place an order giving the expected amount, location in the world, and approximate date of the supply. This information would be recorded by one of us at Exxon on a form and then given to the shipping room. Thereafter, the shipping room would send a telex nomination to the Exxon supplier at the particular location in question to effect physical delivery of the supply. Following the supply, Exxon would invoice Waterman (and also the vessel) and Waterman would, in due course, pay Exxon in accordance with the Exxon/Waterman contract. Exxon has various non-affiliated suppliers throughout the world to meet Exxon's supply commitments to Exxon's customers. These suppliers would invoice Exxon and Exxon would pay the invoice price to such supplier. Exxon would then invoice its customer and the vessel supplied.

4. At Jeddah, for instance, Exxon had a written contract for supplies to be physically delivered by Arabian Marine Operating Co., Ltd. (hereinafter "Arabian Marine"). A copy of the Exxon/Arabian Marine contract in effect at the time of the fuel oil supply is attached as Exhibit "4".

5. On or about January 1, 1982, however, Waterman, in order to take advantage of certain discounts which Exxon was unable to grant to Waterman at Jeddah, discontinued using Exxon at Jeddah (with Exxon's consent) and began purchasing fuel directly from Arabian Marine under terms and conditions of which Exxon had no knowledge. Nominations, however, were still, made by Waterman in New York telephoning Exxon in New York. Exxon, in turn, sent these nominations to Arabian Marine. Exxon was not involved in invoicing or billing between Waterman and Arabian Marine for such supplies and Exxon performed these services as an accommondation to Waterman and without compensation (see generally Exhibit "5").

6. On or about August 25, 1983 Waterman, in New York called Exxon, in New York, and requested that 17,000 barrels of bunker fuel oil be supplied by Arabian Marine to the vessel STONEWALL JACKSON at Jeddah on or about October 16, 1983. A copy of the Exxon request form is attached as Exhibit "6".

7. On or about September 29, 1983 Waterman, in New York, called Exxon, in New York, and requested that 28,000 barrels of bunker fuel oil be supplied by Arabian Marine to the vessel WILLIAM HOOPER at Jeddah on or about October 25, 1983. A copy of the Exxon request form is attached as Exhibit "7".

8. Exxon passed on the supply requests discussed in paragraphs 6 and 7 to Arabian Marine as an accommodation to Waterman in accordance with the procedure outlined in paragraph 5.

9. In or about mid October, 1983, Arabian Marine became concerned about Waterman's ability to pay Arabian Marine for bunker fuel oil being delivered directly by Arabian Marine to Waterman at Jeddah in accordance with the direct arrangements Arabian Marine and Waterman had made. There were various discussions between Exxon and Arabian Marine about this and also between myself and Waterman. As a result of these

discussions, Exxon agreed with Waterman that it would, on a case by case basis, once again supply bunker fuel oil to Waterman at Jeddah under the then current Exxon/Waterman Fuel Oil Contract referred to in paragraph 2 (see generally Exhibits "10" and "11").

10. This agreement for Exxon to once again make deliveries to Waterman at Jeddah under the subject Exxon/Waterman contract was concluded on or about October 19, 1983 at which point the supply to the STONEWALL JACKSON previously ordered from Arabian Marine by Waterman and referred to in paragraph 6 was imminent (see generally Exhibits "10" and "11"). I notified Waterman that Exxon agreed to supply the vessel and Exxon ordered Arabian Marine to make the physical supply on Exxon's behalf in accordance with the existing Exxon/Arabian Marine contract. Fuel was supplied to the STONEWALL JACKSON in accordance with the newly revised arrangement on October 19, 1983. Arabian Marine invoiced Exxon for the supply and Exxon, in turn invoiced Waterman and the Vessel. A copy of the Arabian Marine telex invoice to Exxon for fuel delivered to the STONEWALL JACKSON is attached as Exhibit "12". As can be seen from this invoice, Exxon's payment to Arabian Marine was to be made in Tokyo. This was due to the fact that Arabian Marine was partly owned by Mitsui O.S.K. Lines, Ltd., a Japanese company. A copy of Exxon's invoice to Waterman and the Vessel is attached as Exhibit "13". Exxon paid Arabian Marine for this delivery but Waterman failed to pay Exxon up to and including the time that Waterman filed its Chapter XI Petition on December 1, 1983.

11. Similarly, on or prior to October 26, 1983, Exxon agreed with Waterman to make the supply of bunker fuel oil to the WILLIAM HOOPER previously ordered from Arabian Marine by Waterman and referred to in paragraph 7. Exxon, in turn, ordered Arabian Marine to make this delivery. The delivery was made on or about October 26, 1983. Copies of the delivery receipts are attached as Exhibit "14". Exxon invoiced Waterman (and the vessel) for this delivery. A copy of the invoice is attached as Exhibit "15". Exxon had, in turn, been

invoiced by telex and by mail by Arabian Marine, who had agreed to effect the physical supply at Exxon's request. A copy of these Arabian Marine invoices are attached as Exhibit "16". As with the STONEWALL JACKSON delivery, Exxon made payment to Arabian marine's bank in Tokyo. Waterman, however, failed to pay Exxon for this fuel supplied at Jeddah up to and including the time of the filing of Waterman's Chapter XI Petition on December 1, 1983.

12. There is another supply not at Jeddah for which claim is also made. On or about October 6, 1983 Waterman, in New York, called Exxon, in New York, and requested that 5,300 gallons of marine gas oil be supplied to the vessel WILLIAM HOOPER on October 7, 1983 in New York. A copy of the request form filled out by Exxon is attached as Exhibit "8". In accordance with this request, Exxon delivered the gas oil in question and subsequently invoiced Waterman (and the vessel) for this. The invoice is attached hereto as Exhibit "9" in the amount of $13,241.63. This amount was not paid by Waterman prior to filing its Chapter XI Petition on December 1, 1983.

/s/ James E. Sharkey

Sworn to before me this
25 day of May, 1988.

/s/Jane K. Hobson
Notary Public

[Notary Stamp]

MEMORANDUM

January 25, 1982

TO: Mr. J. W. Holmes

FROM: E. J. Matters Waterman Steamship Corp.

The subject customer approached us in December 1981 advising us that competition has been offering substantial discounts at Jeddah. As company policy will not permit us to participate in this practice in Saudi Arabia we suggested that Waterman make their own arrangements for price and supplies.

Waterman, as a result of our recommendation, and being extremely well satisfied with the service their vessels were receiving at Jeddah, elected to negotiate directly with Arabian Marine Operating Company. While we were not aware of the terms of such agreement, Waterman has requested, and we have agreed, to continue to accept and transmit their nomination as a service to them.

Arabian Marine has similarly agreed and though they offered to reimburse us for the expense involved, we chose not to accept any renumeration, preferring to minimize any financial involvements since the billing would similarly not involve EIC.

The arrangements are retroactive to January 1, 1982.

/s/ EJM

EJM:cms

cc: D. E. Speers
F. H. Ehrhardt

Memorandum Order Blank 407-006C

THINK

[Illegible]: EX/NJ Nom ID Status:
Customer: Waterman S/S Customer Acct No: 77100
Vessel: S/S William Hooper Flag: Am
Cust Order #: VOY13 Port:Jeddah
Delivery Date/Range: Oct 25

Bunkers: Quantity: 28000 Unit: BL
Product: BFO Method: TBA

Agent: [Illegible] Salesperson: [Illegible]
Taken By: [Initials] 9/29 Time: 1630
Placed By: [Illegible] Supplier: 212-747-8984

TELEPHONE NO. (201) 765-5721
DO NOT SEND PAYMENT TO ABOVE ADDRESS

S/S WILLIAM HOOPER & OWNERS

WATERMAN STEAMSHIP CORPORATION
708 RICHARDS BLDG.
NEW ORLEANS, LA. 70112

YOUR ACCT # 100119592

Invoice Number Please Show on Remittance: 105057

Payment due: 11/15/83 Invoice Date: 18OCT83

Original Delivery Location and Date: New York 07OCT83
[Illegible] Ref.: 11H10 Supplier: 125

Description: Gas Oil Quantity: 41.929T
Price: 277.250/T Net Value: 11,624.

Description: Truck Charge Quantity: 4.000T
Price: 300.00/T Net Value: 1,200.

Description: 3.25Pct Gross Recpts Tax
Net Value: 416

Total: U.S.: 13,241

This invoice is based on the receivable, transferred to Exxon International Company, Which Arose from Signed Delivery Receipt No. XXXX

Unless Payment Instructions are Indicated above
Please Refer to Reverse Side

FILE COPY

[Handwritten notes]

Aug 21, 1984

Waterman/Jeddah

Stonewall Jackson — Oct 19
17 KB — ~ 465 K$

William Hooper — Oct 25

28 KB — ~ 765 K$

Cash 30 day
ex U.S.G.
10 - 1 — Int.
5 - 2 — 10%

3 ship behind in payment.
3.5
30 day

Please tell Ryan we have accepted S. Jackson

He was speaking today w/ HAKIM so he (Ryan) could be concerned!

I told Hakim we would take Jackson with no commitment about others.

October 19, 1983

MEMO

TO: P.P.Pierce/J.E. Sharkey

FROM: R.M.Sharp

1. There was a preliminary meeting with Rudzki and Dupont (Treasurers) with Sharp and Sharkey re Waterman. Next week there is a more formal meeting with Treasurers to develop a joint Treasurers/Commercial position. Sharkey will brief Bill Ryan of Waterman re our immediate concerns and the fact that we are still studying the Jeddah situation.

2. Treasurers ok'd Waterman to load 500,000 Bbls. at Jeddah and they are ready to be loaded now.

3. Treasurers is weighing how to contact Manufacturers Hanover Trust to obtain additional financial insight into Waterman.

   Sharkey to cover Items 1-3 in briefing to Pete.

4. Tentative meeting with Nigerian Fuel on Friday, 10/21, 12:30 pm.

*STONEWALL JACKSON 10/19/83

Nom. 17,000 bbls [INITIALS]

THE FOLLOWING UNFORMATTED MESSAGE WAS RECEIVED FROM [ILLEGIBLE].

8954007MOI [ILLEGIBLE]
2009 83-11-[ILLEGIBLE] 11:39

[Handwritten notation: "Chris — Note the 'Allowance' — This is EIC's commission. There is no discount applicable to Waterman! EJM 11/19]

TELEX FROM ARABIAN MARINE BUNKER SALES CO. LTD.
TO MESSRS EXXON INTERNATIONAL CO. LTD.
ATTN: MR. LD MATTERS OR MR. RUDZKI
DATED: 21ST OCTOBER 1983

RE: BUNKER SUPPLIED TO 'STONEWALL JACKSON' AT JEDDAH ON 19TH OCT 1983

INVOICE NO.: 7/J 3414/1153

QUANTITY	DESCRIPTION	UNIT PRICE USD	AMOUNT USD
3,067.12	BUNKER FUEL OIL	189.00	552,081.60
[Hand-written notation: "EIC Commission"]	LESS ALLOWANCE	3.40	10,428.21
			541,653.39

(U.S. DOLLARS FIVE HUNDRED FORTY-ONE THOUSAND SIX HUNDRED FIFTY THREE AND CENTS THIRTY NINE ONLY)

TOTAL USD 541,653.39
ARABIAN MARINE BUNKER SALES CO., LTD.
DULY SIGNED BY A. YAMAJI

KINDLY EFFECT PAYMENT AS AGREED TO THE BANK OF TOKYO LTD., TOKYO OFFICE, A/C NO. 9057400 FOR ACCOUNT OF ARABIAN MARINE BUNKER SALES CO., LTD.

OFFICIAL INVOICE WILL BE AIRMAILED TO YOU WITH SUPPORTING VOUCHERS IN DUE COURSE.

REGARDS
UNQT

EXXON INTERNATIONAL COMPANY
A DIVISION OF EXXON CORPORATION
CONTROLLER'S DEPARTMENT
200 PARK AVENUE
FLORHAM PARK, NJ 07932

UNLESS PAYMENT INSTRUCTIONS ARE INDICATED BELOW, PLEASE REFER TO REVERSE SIDE

TELEPHONE NO. (201) 765-5721
DO NOT SEND PAYMENT TO ABOVE ADDRESS

S/S/ WILLIAM HOOPER & OWNERS

WATERMAN STEAMSHIP CORPORATION
708 RICHARDS BLDG.
NEW ORLEANS, LA. 70112

YOUR ACCT # 100119592

Invoice Number Please Show on Remittance: 115019

Payment due: 11/30/83 Invoice Date: 08NOV83

Original Delivery Location and Date: Jeddah 26OCT83
[Illegible] Ref.: 11H03
Supplier: 999 Order No.:VOY13
Description: Bunker C
Quantity: 4,242.470T
Price: 180.000/T
Net Value: 763,644.60

This invoice is based on the receivable, transferred to Exxon International Company, Which Arose from Signed Delivery Receipt No. XXX

U.S.$ 763,644.60

ARABIAN MARINE BUNKER SALES CO. LTD.
Hamilton, Bermuda
General Sales Agent for
ARABIAN MARINE OPERATING CO., LTD.
Jeddah, Saudi Arabia

INVOICE No. T/J 3425/11569
Date: 31st, October 1983

To Messrs. Exxon International Co., Ltd.
Bunker supplied to "WILLIAM HOOPER" at Jeddah on 26th October, 1983

Quantity: 4,242.47 MTS
Descriptions: Bunker Fuel Oil
Unit Price U.S.$: 180.00 Amount U.S.$: 763,644.60

Descriptions: Less allowance
Unit Price U.S.$: 3.40 Amount U.S.$: 14,424,.40

(U.S. Dollars Seven Hundred Forty Nine Thousand Two Hundred Twenty and Cents Twenty Only)

E. & O.E.

Total: U.S.$ 749,220.20

Please remit the above amount to The Bank of Tokyo Ltd., Tokyo Office, A/C No.0857483 for account of Arabian Marine Bunker Sales Co., Ltd.

ARABIAN MARINE BUNKER SALES CO., LTD.

/s/

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXXON CORPORATION, Plaintiff, -against- CENTRAL GULF LINES, INC. *in personam* and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem.*, Defendants.	AFFIDAVIT OF FRANCIS A. MONTBACH IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT 86 Civ. 9445 (WCC)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FRANCIS A. MONTBACH, being duly sworn, deposes and says:

1. I am a member of the firm of BIGHAM ENGLAR JONES & HOUSTON, attorneys for defendant Central Gulf Lines, Inc., et. al. and having handled this matter since its inception an fully familiar with all the facts and proceedings heretofore had herein.

2. This affidavit if submitted in support of defendant Central Gulf Lines, Inc., et. al. (hereinafter "Central Gulf") motion for summary judgment pursuant to Federal Rules of

Civil Procedure Rule 56(b) denying plaintiff Exxon Corporation's (hereinafter "Exxon") claim of a lien against and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *In rem.*

3. Central Gulf Lines, Inc. is a corporation organized and existing under and by virtue of the laws of the state of Delaware with an office and place of business at One Whitehall Street, New York, New York. At all material times, Central Gulf was the owner of the vessel now known as the GREEN HARBOUR (ex WILLIAM HOOPER), a vessel documented under the laws of the United States and at all material times flying the United States Flag. (hereinafter referred to as "the vessel" or "WILLIAM HOOPER").

4. On October 11, 1979, Waterman Steamship corporation (hereinafter "Waterman") as charterers and Central Gulf as owners entered into a twelve (12) year bareboat charter party agreement granting Waterman the right to hire the WILLIAM HOOPER, the terms of this charter party being identical as those contained in the attached charter party of the "GREEN VALLEY". (Defendant's Exhibit A). It was agreed that Waterman employ the vessel for common carriage of goods by sea in its American flag fleet between ports in the United States and various ports in the Middle East and/or Far East. The charter party contained a "no lien" clause prohibiting the Charterer from imposing a lien on the vessel. (Defendant's Exhibit A, Clause 23.) Furthermore, Clause 30 provides that the charter party was to be construed and governed in accordance with the admiralty and maritime laws of the State of New York.

5. Based upon documents produced, Exxon claims to have been arranging supplies of gas oil and bunker fuel oil for Waterman for the years 1972 through 1974 and 1981, under a so called "Essomarine Lubricants Contract" and an "Exxon Marine Fuel Contract".[1] (Defendant's Exhibit B). Prior to January, 1982, approximately the time when oil prices started to drop, the individual bunker supplies were arranged by Exxon by means of a telephone nomination from Waterman to Exxon,

[1] No such fuel contract has been produced for the years 1982 or 1983.

who in turn would contact a domestic or foreign supplier in the particular port of loading (Defendant's Exhibit C). As such, Exxon itself did not act as a supplier within the meaning of the Ship Mortgage Act 46 U.S.C. Section 971, et seq.[2] Instead, they arranged for the suppiy of vessels by local fuel companies in the particular port of loading under a specific agreements, with each local supplier.

6. On or about October 7, 1983 Exxon was requested to arrange the supply of 41,929 tons of fuel gas oil to the WILLIAM HOOPER at New York. (Defendant's Exhibit T) It is claimed that these bunkers were delivered to the vessel by a supplier. As a result, Exxon invoiced Waterman for this fuel on or about December 1, 1983, in the amount of $11,624.82. However, no proof hs been given establishing actual delivery to the vessel.

7. When Exxon arranged for the supplying of bunkers to vessels at the port of Jeddah, Saudi Arabia, it did so in furtherance of a contract between itself and Arabian Marine Operating Company (hereinafter "Arabian Marine"). Under this bunkering agreement, dated May 1, 1977, Arabian Marine retained Exxon to procure customers for Arabian Marine to be supplied with bunkers in Jeddah. (Defendant's Exhibits E and F). In order to comply with the terms of this agreement Exxon was to solicit customers for the sale of marine fuels to be supplied by Arabian Marine at Jeddah, for which services Exxon received a commission. (Defendant's Exhibits E, G and I). Exxon arranged for Waterman to obtain any bunkers it needed at Jeddah from Arabian Marine. The latter would supply the bunkers to a specific vessel, invoice Exxon, Exxon would pay Arabian Marine and then Exxon would invoice Waterman (Defendant's Exhibit C). The service rendered by Exxon consisted simply of bringing together a willing buyer and a willing supplier of fuel

[2] "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owners, . . ."

oil, in the attempt to conclude a contract. The Ship Mortgage Act 46 U.S.C. Section 971 extends the protection of a maritime lien to "a person... furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries to any vessel...", however, it is well established law that a brokerage contract is not a maritime contract and does not give rise to a maritime lien. Thus the maritime lien for brokerage services asserted by Exxon is completely without legal support or precedent.

8. In early 1982, local Jeddah bunker suppliers, reacting to the recession in the world oil market, started discounting their prices (Defendant's Exhibits J and K). Waterman, becoming aware of this discounting, requested that Exxon arrange for similar price reductions, however, Exxon felt that their company's policy would not permit them to act in violation of a direct order by the Saudi Government not to sell fuels below government set prices. Exxon recommended to Waterman that it negotiate directly with Arabian Marine (Defendant's Exhibit K at page 37). As described in a memorandum dated January 15, 1982, written by Mr. Edward J. Matters, the Senior Marketing Executive of Exxon, Exxon, as of that date, chose to no longer be actively involved with the soliciting of customers for bunkering by Arabian Marine at Jeddah (Defendant's Exhibits K and L). Since Exxon, by the end of January, 1982, was no longer involved in soliciting or arranging such bunkering arrangements, they did not receive any renumeration, in the form of commissions, or otherwise, as in the past. (Defendant's Exhibit 8).

Exxon's only involvement with Waterman's bunkering orders for Jeddah, after January 25, 1982, was tangentially through the providing of communication services for Waterman to place its own orders directly as a service to customer in good standing. Exxon allowed Waterman to transmit their orders to the supplier, Arabian Marine, through Exxon's Mariner telex system. Exxon would transmit the order for Waterman and then cancel it internally, so that Arabian Marine knew that Exxon was only transmitting a Waterman order.

(Defendant's Exhibits J; K at page 40; H at page 9-10). As stated by Exxon's Mr. James Sharkey:

"This was the methodology of informing AMOCO that Waterman wanted to bunker a ship *but we were not in the title change*. It was more or less a passing of information." (emphasis added). Defendant's Exhibit K at 37.

In fact, Exxon did not know at what price Waterman was buying fuel oil from Arabian Marine. (Defendant's Exhibit K at page 39). Thus, after January 25, 1982, Exxon was no longer acting as a broker for Arabian Marine for supplies to Waterman's chartered vessels in Jeddah.

9. By October, 1983, Waterman's financial position had deteriorated and some invoices for bunkers supplied in Jeddah by Arabian Marine to Waterman were delayed in payment by Waterman. (Defendant's Exhibit H at p. 10).

10. Sometime in mid-October 1983, Arabian Marine's Mr. Hakim contacted Mr. Edward J. Matters of Exxon, requesting that Exxon take back Waterman as a customer and to revert to the old procedure where Exxon would physically place the nomination and accept the credit responsibility for the payment of the supplies. (Defendant's Exhibits M, N, O, P and Q). The STONEWALL JACKSON and WILLIAM HOOPER had been nominated to load at Jeddah on or about October 19, and 26, 1983, respectively. After January 1982, when Waterman was acting directly with Arabian Marine, Waterman had the habit of ordering bunkers one month before the scheduled loading date. (Defendant's Exhibit P at 77 and Exh. S). With regard to the October 26 lifting, Exxon had no involvement with the placement of Waterman's order for bunkering of the WILLIAM HOOPER at Jeddah, which order had been placed on September 29, 1983, at least three weeks before Exxon was asked by Arabian Marine to guarantee payment of this delivery (Defendant's Exhibits R and S). Thus, the October 26 lifting was one of those orders made by Waterman merely using Exxon's telex facilities. It is evident, therefore, that Exxon cannot rely upon the Maritime Lien Act 46 U.S.C. section 971

since this section clearly states that it applies only to one who has supplied the vessel "...upon the order of the owner of such vessel, or of a person authorized by the owner...". Clearly, the Federal Maritime Lien Act does not protect Exxon in a situation where they neither ordered nor supplied the vessel.

Shortly after the delivery was made, a confirmation telex, dated October 27, 1983, was sent to Arabian Marine directly to Waterman (Defendant's Exhibit V).

11. The fact that Exxon was acting "only as a guarantor" is emphasized by the fact that subsequent to the delivery an invoice was sent to Exxon for the delivery of bunkers to the WILLIAM HOOPER (Defendant's Exhibit G). This invoice reflects the commission payable to Exxon, which can only affirm that Arabian Marine wished to treat Exxon as its broker again. On or about November 16, 1983, the "Jeddah bunkering agreement" was reinstated and amended, retroactively to October 19, 1983, the date of a prior bunkering of the STONEWALL JACKSON in Jeddah by Arabian Marine, giving back to Exxon its status as broker for Arabian Marine (Defendant's Exhibit X). This agreement, however, was not executed until December 21, 1983, one month after Waterman had filed for reorganization under Chapter 11 of the United States Bankruptcy Code (Defendant's Exhibit Y).

12. Exxon is now attempting to position itself within the protection of the Ship Mortgage Act by asserting that it acted as the "supplier" of the fuel oil to the WILLIAM HOOPER and relied on the credit of the vessel in so doing. This argument is without merit. As discussed above, Exxon has admitted that it did not act as a supplier of fuel oil. At best, it was acting as a broker in accordance with the Arabian Marine–Exxon contract which specifically describes Exxon's services as those of a broker.

Even if, for argument's sake, one would characterize Exxon as being a supplier, in this transaction, the Ship Mortgage Act would be of no avail to Exxon, since Exxon did not rely on the credit of the vessel. Reliance on the credit of a

vessel as required under 46 U.S.C. Section 971 is a rebuttable presumption to be determined by objective standards. James E. Sharkey of the Exxon Marine Sales Department who was directly involved in this claim, testified that he was not aware of the fact that the WILLIAM HOOPER was owned by Central Gulf Lines (Defendant's Exhibit D) and that to his knowledge Exxon had *never* relied on the credit of a vessel or arrested a vessel if a bunkering bill went unpaid (Defendant's Exhibit D). In order to avoid an interruption of Waterman operations due to Arabian Marine's stated unwillingness to continue to supply Waterman vessels, Exxon extended an additional 1.5 million to 2.5 million on its existing 6 million credit line to Waterman (Defendant's Exhibits W and BB). In fact, when Exxon had committed itself to guarantee payment of the STONEWALL JACKSON and the WILLIAM HOOPER to Arabian Marine, they opened discussions with Waterman with regard to securing their credit exposure with a Letter of Credit or some other form of security provided for *by Waterman.* (Exhibits Z and BB). Under such circumstances, one would be hard pressed to believe that Exxon ever looked to the credit of the vessel and would break its long time habit of abjuring from arresting a vessel for non-payment. In fact, Waterman was never required to put up security since Exxon relied on its long term business relationship with Waterman and believed them to have an:

> ". . . excellent banking relation with Manufacturers Hanover and they (the bank) are going to see us (Waterman) through this crisis." (emphasis added). (Defendant's Exhibit AA).

In fact, Waterman failed to make arrangements for meeting with a high level contact at Manufacturers Hanover Bank to satisfy Exxon's requests for security. (Defendant's Exhibit BB) Thus, Exxon solely looked upon Waterman to fulfill the obligations incurred by them as guarantor.

14. On December 1, 1983, Waterman filed for Chapter 11 Reorganization with the United States Bankruptcy Court and Exxon filed a proof of claim in this proceeding (Defendant's Exhibits Y & and CC). Exxon to date has received at least

$86,321.39 in cash out of the reorganization plan for Waterman confirmed on June 19, 1986 and a total of $63,772.82 in stock dividends. Now Exxon is claiming the remaining, non-reimbursed amount against Central Gulf *in personam* and the WILLIAM HOOPER *in rem*.

15. As set forth in above factual statement, the facts do not support Exxon's claim for the existance of a maritime lien under the Ship Mortgage Act 46 U.S.C. Section 971 et seq. where Exxon did not act as supplier and even if Exxon would have supplied the necessaries to the vessel, this was not done on the credit of the vessel.

Whereas there is no genuine issue as to any material fact as set forth in this affidavit, defendant Central Gulf Lines if of the opinion that they are entitled, as a matter of law, to a judgment in their favor dismissing plaintiffs' claim. We therefore respectfully request this Court to grant defendants motion for summary judgment, dismissing plaintiffs' action.

/s/ Francis A. Montbach

Sworn to before me this
22nd day of June, 1988

/s/ Vincent T. Hoban, Jr.
Notary Public

[Notary Stamp]

[Excerpt of deposition of James E. Sharkey attached as Exhibit D to Montbach Affidavit filed 6/23/88]

Q. Now, with regard to the WILLIAM HOOPER, were you aware at the time this transpired as to who the actual owner of the WILLIAM HOOPER was?

A. I just assumed it was Waterman's ship. It was a Waterman's ship, as far as I was concerned.

Q. You had no knowledge as to who the true owner was?

A. No, I did not.

Q. Did you have any knowledge as to whether or not the vessel was under charter for Waterman?

A. I really never gave it any thought. I just knew the HOOPER was part of the Waterman fleet. Whether it was — I didn't give any thought as to its equity ownership or whatever.

Q. How did you know it was part of the Waterman fleet?

A. As part of our file, we have a listing of the ships that are controlled by various accounts.

Q. Are you referring to a specific document?

A. It's possible, here again, possible that the name of the ship might have been attached to the lube contract that we had for the Waterman fleet. Oftentimes it's just a fly sheet included in the customer's file folder, desk file folder.

* * *

A. No, our relationship was exclusively with Waterman. We at this point in time had not asked for any letters of credit. Is that what you —

Q. Well, I'm — whatever form —

A. No. —

Q. — whatever form of payment from anyone else.

A. No, our relationship, our contract was exclusively with Waterman. There was no letter of credit in place at this point in time.

MR. PARE: I'm not sure the witness clearly understands your question, which — I know what you're getting at, but —

A. Would you — I'll be happy to answer it, maybe, if you want to rephrase it.

Q. What I'm asking is, were you looking to the credit of Central Gulf Lines with regard to any of the vessels' —

A. No. —

Q. — outstanding amount supposedly owed you by Waterman?

MR. PARE: Are you talking about Central Gulf itself or the vessels?

MR. MONTBACH: Well, let's go one at a time.

A. No, I would have no reason to even think Central Gulf should be involved.

Q. What about the vessels themselves, the individual vessels that were being bunkered? Were you relying on the credit of those vessels?

A. Our sale is always, as it is in our contract, it says that the sale is to the vessel and, yes, if push came to shove at the end of the day, Exxon could always go and lien the vessel, if

that were — that's a situation in which Exxon would take with absolute care.

It's something that we don't do willingly. So it's something that, sure, it's a given. You could do this at the end of the day. But it's something that we would very reluctantly approach.

Q. Was that something that you were more reluctant to approach with Waterman vessels than —

A. Any vessels. Exxon has a — I think, if you look back through our records, ECI, the corporation I work for, I can't personally recall any vessel ever being arrested. We go to great pains to explore every avenue before we revert to that issue.

Q. Are you aware of them ever having done that?

A. ECI? The corporation I work for? No. I don't know of any instance where my corporation, a customer of mine, had a ship arrested. They came close —

Q. Pardon me?

A. We have come close, we've threatened lawsuits, but we have not yet, to my knowledge, arrested a ship. Now, the corporation, other affiliates, I'm sure, were involved in ship arrests, but I wouldn't be aware of them.

Q. I think just a few more questions, sir.

Now, sir, prior to the middle of October 1983, you said there had been conversations, ongoing conversations with regard to the viability, if you will, of Waterman and you had been part of these conversations; is that correct?

A. Yes.

Q. Had you ever received any memoranda setting forth what the Waterman fleet was and who owned the various vessels in the Waterman fleet?

A. There were memos that were issued by the treasurer's department that gave a historical outline

JEDDAH BUNKERING AGREEMENT

This Agreement between the Arabian Marine Operating Company (hereinafter called Arabian Marine) and Exxon International Company (hereinafter called Exxon) covers the solicitation of bunker customers by Exxon and the sale and delivery of marine fuels as bunkers by Arabian Marine to such customers at the port of Jeddah, Saudi Arabia.

SERVICES

Exxon shall solicit and arrange for the sale of marine fuels to international customers having bunkering requirements at the port of Jeddah. Arabian Marine shall supply marine fuel to those customers nominated by Exxon.

PRODUCTS

The marine fuels to be delivered under the procedures established in this Agreement shall be commercial grades of Bunker Fuels Oil and/or Marine Diesel Oil and/or Light Marine Diesel and/or Marine Gas Oil offered by Arabian Marine at the time of delivery. Arabian Marine shall bear no responsibility for the selection and acceptance of the marine fuel for use in the vessels to which such marine fuel is delivered, but will be responsible to insure that marine fuel of the grade and specification nominated is delivered.

PRICING

The product price to be invoiced to Exxon for marine fuels delivered under this Agreement shall be Arabian Marine's product selling price in U.S. dollars in effect at the time of delivery for the grade of marine fuel delivered. Arabian Marine will immediately advise Exxon by cable or telex of any change in their product selling price. Arabian Marine's normal barging charge will be shown separately on each invoice.

PAYMENT

Payment for each marine fuel delivery is to be made by Exxon to Arabian Marine in U.S. Dollars within 30 days after the date of delivery or 10 days from receipt of the invoice and supporting documents, whichever is later. In return for services performed by Exxon, Arabian Marine will pay Exxon a commission equal to one and three quarters percent (1-3/4%) of the invoiced product price. This commission shall be deducted from the invoice issued by Arabian Marine and from Exxon's payment to Arabian Marine. An additional volume commission will be paid to Exxon by Arabian Marine at the end of each six month consecutive period commencing from the effective date of this agreement. Such volume commission will apply to the total volume delivered within the period and will be paid within 15 days following the end of the period. The volume commission rate will vary according to the total volume delivered within each six-month period as follows:

Total Volume		Rate for Total Volume
Over 12,000 metric tons	-	$0.50 per metric ton
Over 18,000 metric tons	-	$0.75 per metric ton
Over 24,000 metric tons	-	$1.00 per metric ton
Over 30,000 metric tons	-	$1.25 per metric ton

All payments due Arabian Marine under this agreement shall be made in U.S. Dollars via telegraphic transfer to National Commercial Bank, Jeddah for account Arabian Marine Operating Company, account No. 37444.

All payments due Exxon under this agreement shall be made in U.S. Dollars via telegraphic transfer to Bankers Trust Company, 16 Wall Street, New York, New York for account Exxon International Company, Account No. 038-1-089606.

NOMINATIONS

Exxon or its representative will nominate directly to Arabian Marine those ships that the latter is to supply under this

Agreement, and will provide details of the quantity and quality of the products required. This will be done by telex or by cable, at least 48 hours in advance of the date on which the delivery has been requested. Deliveries by Arabian Marine under this Agreement shall be made only pursuant to previously received instructions.

DELIVERIES

Arabian Marine will expeditiously supply the ships nominated by Exxon or its representative at any hour of the day or night on working days or holidays, without applying any extra charge, subject to port regulations and/or government orders.

In the event that more than one vessel requires bunkering at the same time, the order of arrival will be in principle respected. Arabian Marine will not be liable for demurrage or for any loss due to congestion at the loading terminal of Jeddah refinery or to prior commitments of available delivery equipment. Arabian Marine will only be liable for demurrage or detention when the said demurrage or detention is imputable to the negligence of its own personnel or its agents.

Notice of a claim arising under this Agreement shall be given in writing to Arabian Marine within ninety days from date of delivery.

TITLE

Title to all fuel delivered by Arabian Marine to the nominated customers solicited by Exxon will pass directly from Arabian Marine to the customer at the flange of the receiving vessel.

RECEIPT

Arabian Marine will obtain a receipt for each delivery on the certificate of delivery by signature of the Captain, Chief Engineer or authorized representative of the vessel to which the marine fuel is delivered and will send by air mail the original

and two copies of each delivery receipt to Exxon attached to the appropriate invoice.

Subsequent to each delivery Arabian Marine will cable details of such delivery to Exxon or its designated affiliate specifying the data as shown in Attachment I.

MEASUREMENTS AND SAMPLES

Arabian Marine shall extend an express invitation to the Chief Engineer or his delegate of each ship supplied so that he may be present at the measuring operations carried out at the beginning and end of the delivery and may also observe the way in which the fuel samples are taken during the said supply operation.

The quantity of marine fuel delivered shall be determined from the official gauge, meter, or tank ullage of the barge, tank or pier effecting delivery. Adjustment in volume owing to difference in temperature shall be made in accordance with ASTM-API-IP Petroleum Measurement Table 54. In the measurement of marine fuel, Arabian Marine shall make a deduction for all water and non-petroleum sediment in excess of one per cent (1%) and shall not invoice for this excess. If the Captain, Chief Engineer or authorized representative of the vessel for which marine fuel has been requested is not present or represented, the Arabian Marine determination of quantities shall be deemed to be correct. Arabian Marine will permit the Buyer to inspect the oil delivered before it is pumped to the vessel.

Representative samples from each grade of fuel delivered shall be taken, complying in all respects with Attachment II.

At the end of each delivery, Arabian Marine shall deliver to the Captain, Chief Engineer or authorized representative a sealed sample of the product delivered, retaining another identical sample in the installation at Exxon's disposal for a minimum period of 90 days.

The delivery of sample on board will be reflected in the receipts signed by the authorized representative of the vessel. The delivered volumes and quality shown on the receipts signed on board, will be considered as the only valid data for all the purposes of the present agreement.

LIABILITY

Under no circumstances will Arabian Marine be held liable if unable to make delivery because of causes not reasonably within Arabian Marine's control and for which Exxon or its affiliates are excused by Force Majeure provisions in their customer contracts. Such causes include, but are not limited to, labour disputes, strikes, government interventions, wars, civil commotions, fire, flood, accident, storm, or any act of God.

ASSIGNMENT

This agreement may be assigned in whole or in part by either party to any affiliate or subsidiary upon written notice to the other party, but to a third party only with the express consent of the other party.

TERM

This agreement shall commence on May 1, 1977 and shall continue until terminated at the end of any calendar year by either party upon not less than three months' prior written notice to the other.

ACCEPTED & AGREED TO ON BEHALF OF	ACCEPTED & AGREED TO ON BEHALF OF
ARABIAN MARINE OPERATING COMPANY	EXXON INTERNATIONAL COMPANY
By: /s/_____	By: /s/_____

ATTACHMENT I

INTERNATIONAL MARINE SALES — DELIVERY
COMMUNICATION & INVOICING SYSTEM

Delivery Data Cable

The following format will be used for the cable transmission to EIC N.Y. (cable address shown below) of bunker delivery data related to all Jeddah deliveries.

EXXONINCON
New York
Attention: AVMARSEC

A	DATE OF DELIVERY (Always write: month, day & year in this order)
B	DELIVERY INVOICE NUMBER
C	NAME OF VESSEL
D	NAME OF CUSTOMER
E	JEDDAH, S.A.
F	MODE OF TRANSPORTATION (barge, pipeline, etc.)
G	PRODUCT GRADE/UNIT PRICE (Bunker Fuel Oil, Marine Diesel Oil)
H	GROSS BARRELS
K	LOADING TEMPERATURE
L	A.P.I. GRAVITY
M	NET BARRELS
O	HASH TOTAL (G + H + K + L + M)
P	METRIC TONS (2 DECIMALS)
Q	OTHER CHARGES (explain: taxes, extra hoses, etc.)
	SENDER (ARABIAN MARINE — JEDDAH — cable address)
	COPY OF DELIVERY DATA CABLE ATTACHED.

Explanatory Notes:

For more than one products, separate information required by a slant line, e.c.,

G	-	BFO/68.00 MDO/98.00
H	-	500.23/100.11
K	-	95/85
L	-	18.1/27.1
M	-	490.1/97.5
O	-	62000/21142

Number the cables consecutively in an appropriate series.

ATTACHMENT II

FUEL SAMPLES AND QUANTITY CONTROLS

Arabian Marine will:

- Invite the Captain, Chief Engineer or authorized representative to witness the quantity measurements made at both the start and finish of the delivery.

- Invite the Captain, Chief Engineer or authorized representative to witness the method by which representative samples of the delivery are drawn.

- Provide the Chief Engineer with a sample representative of each product delivered.

- Retain at the delivery port for at least 90 days a second sample representative of the product delivered.

Communications with Chief Engineers

Before bulk delivery begins, the Captain, Chief Engineer or authorized representative will be advised of the procedure and invited to inspect and witness the quantity-determination procedure and the drawing of samples.

Obtaining Representative Samples:

- Samples should be drawn on all deliveries of marine fuels.

- Only clean and empty sample collectors should be used. All normal precautions should be taken to avoid contamination (by rain or dirt, for example).

- The most representative sample is a drip (continuous) sample taken throughout the delivery. If this is not practical, a composite sample will consist of equal portions taken at the start, midpoint, and end of the delivery.

- The size of the sample drawn should amount to at least one liter (or quart).

- Sampling location on pipeline will be as near the ship as possible.

Preparation of Ship's and Retained Samples

The representative sample drawn during the delivery will be well mixed before taking off the two 1/2 liter (1/2 quart) samples. The containers used for these two samples will be made of tin or plastic. After filling, the containers will be labelled with the following information:

- Name of vessel

- Supplier

- Date of delivery

- Delivery port

- Product grade

- Name of barge, tank or pier facility.

PRESENTATION OF SAMPLE

One of the sealed samples will be given to the ship's Chief Engineer. The other should be retained by Arabian Marine for at least 90 days. The fact that a sample is given to the Chief Engineer will be indicated on the delivery ticket.

EXXON INTERNATIONAL COMPANY

1251 Avenue of the Americas
New York, N.Y. 10020

April 27, 1977

Mr. N. Takamiya
Arabian Marine Operating Co.
c/o Mitsui-OSK
3-3, Akasaka 5-chome,
Minato-ku, Tokyo, Japan

Jeddah Bunkering Agreement

Dear Sir:

This will confirm our mutual understanding regarding two points in the payment clause of the subject agreement.

(1) Prior to December 31, 1977 Exxon and Arabian Marine will review invoicing and payment performance, particularly the interval from date of delivery to receipt of the invoice and documents by Exxon, to determine whether the 10 day period from receipt of invoice to payment should be modified.

(2) Concerning the volume commission to be paid by Arabian Marine to Exxon, the initial period for computation and payment will be extended from six to eight months i.e., May 1, 1977 through December 31, 1977, which thus changes the volume criteria as follows:

Total Volume	Rate for Total Volume
Over 16,000 metric tons	$0.50 per metric ton
Over 24,000 metric tons	$0.75 per metric ton
Over 32,000 metric tons	$1.00 per metric ton
Over 40,000 metric tons	$1.25 per metric ton

Commencing with deliveries January 1, 1978 the computation and payment of the volume commission will be governed by the terms of the basic agreement.

If you concur with this understanding, kindly countersign and return one copy of this letter.

Very truly yours,

Agreed

/s/ _____ /s/ _____

N. Takamiya F. J. Iarossi

Arabian Marine Operating Co. Ltd.

EXXON INTERNATIONAL COMPANY

1251 Avenue of the Americas, New York, NY 10020

Marine Sales Department
J S BATES Vice President and Manager

April 25, 1978

Addendum to Jeddah Bunkering Agreement

Mr. N. Takamiya
Arabian Marine Operating
c/o Mitsui-Osk
3-3, Akasaka 5-chome
Minato-Ku, Tokyo, Japan

Dear Sir:

With reference to "Jeddah Bunkering Agreement" which commenced May 1, 1977, it is hereby mutually agreed between Arabian Marine Operating Company (Arabian Marine) and Exxon International Company (Exxon) that the first sentence of the clause "PAYMENT" is amended to read:

"Payment for each marine fuel delivered is to be made by Exxon to Arabian Marine once a month not later than the 15th day of the month for such deliveries made in the previous month, and Exxon will provide cable advice to Arabian Marine containing the telegraphic transfer number and the name of the bank through which payment was arranged."

An additional sentence which become the second sentence of the "PAYMENT" clause reads as follows:

"Invoices received later than seven days following month of delivery will be paid by Exxon to Arabian Marine ten days after receipt of invoices, and supporting documents."

It is further agreed that this change in payment terms will become effective with deliveries commencing April 1, 1978.

Please indicate your agreement by affixing your signature in the space provided and return to us for our records.

Very truly yours,

/s/ J. S. Bates

J.S. Bates

ACCEPTING AND AGREED TO
ON BEHALF OF
ARABIAN MARINE
OPERATING COMPANY

By: /s/ N. Takamiya

Arabian Marine Operating Co. Ltd.

Exxon Ex. 2 for ID
Aug. 21, 1984

ARABIAN MARINE OPERATING CO LTD
JEDDAH - SAUDI ARABIA
H.R.H. Prince Abdallah Al-Faisal Al-Saud, Chairman

12th February, 1981

Mr. E.J. Matters
EXXON International Company
1251 Avenue of the Americas
New York, NY 10020

Dear Sir,

Addendum to Jeddah Bunkering Agreement

Reference is made to our telex communication regarding amendment of "JEDDAH BUNKERING AGREEMENT". We are pleased to enclose herewith original and duplicate of relative addendum duly endorsed by us.

As we explained by telex, for the reason of our internal accountancy convenience, a new company named Arabian Marine Bunker Sales Co., Ltd. was established and we entrust this company with the collection of bunker value and settlement of commission with your company.

Enclosed addendum is prepared to incorporate the new company's function into present agreement. And also, taking this opportunity, we have incorporated all amendments made by previous addenda dated April 25, 1978 and May 2, 1978 respectively.

We shall be much obliged if you will kindly examine the contents and if you find them agreeable please return the duplicate to us with your signature.

Yours faithfully,

Arabian Marine Operating Co. Ltd.

N. Takamiya
Managing Director

Exxon Ex4 for ID
Aug 21, 1984

ADDENDUM
TO
JEDDAH BUNKERING AGREEMENT

With reference to "Jeddah Bunkering Agreement" commenced May 1, 1977, it is this day mutually agreed between Arabian Marine Operating Company (hereinafter called Arabian Marine) and Exxon International Company (hereinafter called Exxon) that the Clause "PAYMENT" is amended as follows:-

(A) Payment for each marine fuel delivery is to be made by Exxon to Arabian Marine Bunker Sales Co., Ltd. (hereinafter called AMBS) once a month not later than the 15th day of the month for such deliveries made in the previous month, and Exxon will provide cable advice to AMBS containing the telegraphic transfer number and the name of the bank through which payment was arranged. Invoices received later than seven days following month of delivery will be paid by Exxon to AMBS ten days after receipt of invoices and supporting documents.

(B) In return for services performed by Exxon, Arabian Marine will pay Exxon a normal commission equal to one and three quarters percent (1-3/4%) of invoiced product price.

An additional volume commission will be paid to Exxon by Arabian Marine at the end of each six month consecutive period commencing from the effective date of this agreement.

Such volume commission will apply to the total volume delivered within the period and will be paid within 15 days following the end of the period.

The volume commission rate will vary accordingly to the total volume delivered within each six month period as follows:

Total Volume	Rate for Total Volume
over 12,000 metric tons	$0.50 per metric ton
over 18,000 metric tons	$0.75 per metric ton
over 24,000 metric tons	$1.00 per metric ton
over 30,000 metric tons	$1.25 per metric ton

Settlement of both normal and additional volume commission shall be made through AMBS.

Normal commission shall be deducted from the invoice issued by AMBS from Exxon's payment to AMBS.

Additional volume commission shall be deducted from Exxon's payment to AMBS after mutual conformation of the amount of volume commission.

(C) All payment due Arabian Marine under this agreement shall be made in U.S. dollars via telegraphic transfer to The Bank of Tokyo, Ltd., Tokyo Office for account of Arabian Marine Bunker Sales Co., Ltd. Account No. 0857483.

All payment due Exxon under this agreement shall be made in U.S. dollars via telegraphic transfer to Bankers Trust Company, 16 wall Street, New York, New York for account Exxon International Company, Account No. 038-1-089606.

It is further agreed that this addendum supersedes previous addenda dated April 25, 1978 and May 2, 1978 and this addendum is effective with deliveries commencing from January 1, 1981.

Date: January 1, 1981, Jeddah

ARABIAN MARINE OPERATING COMPANY	EXXON INTERNATIONAL COMPANY
/s/ N. Takamiya	_____
N. Takamiya Managing Director	

EXXON INTERNATIONAL COMPANY

1251 Avenue of the Americas, New York, NY 10020

March 3, 1981

Jeddah Bunkering Agreement

Mr. N. Takamiya
Arabian Marine Operating Co. Ltd.
c/o Mitsui OSK
1-1 Toranomon 2-Chome,
Minato-Ku, Tokyo
105 Japan

Dear Mr. Takamiya:

We return herewith, duly executed, copy of addendum to the "Jeddah Bunkering Agreement" concerning the establishment of Arabian Marine Bunker Sales Co., Ltd. through which invoices and payments shall be rendered effective January 1, 1981. Said addendum also incorporates the two previous amendments dated April 25, 1978 and May 2, 1978.

With kind personal regards.

Very truly yours,

/s/ E.J. Matters
E.J. Matters

EJM: cms
Attachment

D3/14

QT

TELEX FROM ARABIAN MARINE BUNKER SALES CO., LTD.

TO MESSRS' EXXON INTERNATIONAL CO., LTD.

ATTN' MR.

DATED: 31ST OCTOBER 1983

RE: BUNKER SUPPLIED TO 'WILLIAM HOOPER' AT JEDDAH ON 26TH OCTOBER 1983

INVOICE NO; T/J03425/1159

QUANTITY	DESCRIPTION	UNIT PRICE USD	AMOUNT USD
4,242.47MT	BUNKER FUEL OIL	180.00	763,644.60
[Handwritten notation: EIC Commission]	LESS ALLOWANCE	3.40	14,424.40
			749,220.20

(U.S. DOLLARS SEVEN HUNDRED FORTY-NINE THOUSAND) TWO HUNDRED TWENTY AND CENTS TWENTY ONLY)

TOTAL USD 749,229.28

ARABIAN MARINE BUNKER SALES CO. LTD.
DULY SIGNED BY A YAWJI

KINDLY EFFECT PAYMENT AS AGREED TO THE BANK OF [ILLEGIBLE] OFFICE, A/C NO. 0857483 FOR ACCOUNT OF ARABIAN MARINE CO., LTD

OFFICIAL INVOICE WILL BE AIRMAILED TO YOU [ILLEGIBLE] IN DUE COURSE

REGARDS
UNQT
BEST REGARDS
S. HAKIM

[Excerpt of deposition of Edward J. Matters attached as Exhibit H to Montbach Affidavit filed 6/23/88]

Arabian Marine charged?

A. Whatever Arabian Marine passed on to us, we pass on to the customer.

Q. Any difference in the price?

A. Not usually.

Q. Would there be a commission of some sort?

A. Commission payable to Exxon for bringing the business to Arabian Marine.

Q. Sir, did there ever come a time when the arrangements that you just described changed in any way?

A. Only with the respect to discounting that became prevalent in Saudi Arabia several years ago and Exxon chose not to participate in granting discounts for delivery to Saudi Arabia, and as such, most of our business was lost. Customers chose to go direct to various suppliers in Saudi Arabia for their bunkers.

In this case, Exxon was not involved in any way.

Q. Did that situation, that type of situation occur with respect to Waterman?

A. Yes, specifically it did.

Waterman came to us like many of our customers saying our prices were not competitive and we could only suggest if they didn't want to buy from us, they could go directly to the supplier and make their own deal for the prices, in which case Exxon was not involved. Except in the case of Waterman, we agreed as a service to the customer to continue to be the vehicle

for which the nomination would get transmitted to the supplier in Saudi Arabia.

We would send a telex out with the nomination.

Q. Did you receive —

A. But, not remuneration at all for Exxon.

Q. I show you a document and I ask you if you can identify it.

A. Yes, that's a memorandum documenting what I just explained.

Q. Was that prepared by you.

A. It was prepared by me.

Q. Was that prepared on or about January 25th?

A. January 25th, 1982. A memorandum to my boss telling him what had happened.

MR. PARÉ: I would like to mark that as Exxon Exhibit 6.

(Memorandum from Mr. Matters dated on or about January 25, 1982, marked as Exxon Exhibit 6 for identification.)

Q. Sir. prior to January 1982, Exxon had been making the deliveries directly?

A. That's correct.

Q. To your customers in —

A. Jeddah, yes.

Q. But after that, those deliveries were being effected by—

A. By the suppliers, independent suppliers in Saudi Arabia on a direct basis.

Q. In addition to the nomination process, did Exxon have any involvement in connection with any of these supplies in Jeddah made directly by AMOCO?

A. Only with respect to Waterman. We accepted the nomination and passed them on to the supplier in Jeddah. Arabian Marine Operating Company.

Q. I show you another document and I ask you if you can identify that.

A. This was subsequent to them taking over the business in October.

Q. They being whom, AMOCO?

A. AMOCO took the business over as I said in January of '82.

During the year of '82, periodically Waterman was late in their payments and the supplier would let me know about it. We would pass on the information to our treasury people and our salespeople for their information and I would imagine that was passed on to Waterman, and Waterman would settle now and then with the supplier.

And, this was a cable from one of the principals in Japan of Arabian Marine thanking me for what he thought was our direct assistance, but in essence we really took no direct action in getting Waterman to pay.

Q. So this document is an example of —

A. Our —

Q. — correspondence concerning —

A. Concerning Waterman.

Q. Nonpayment from Waterman to AMOCO?

A. Yes.

Q. AMOCO is the short name for what?

A. Arabian Marine Operating Company. AMOCO sounds too much like the oil company but it is a lot easier to say.

Q. This document reads below it, "Mitsui OSK Lines, Tokyo."

A. Mr. Takamiya is one of the directors of Arabian Marine Operating Company and also an employee of Mitsui OSK Lines that owns 40 percent of the Arabian Marine Operating Company.

MR. PARE: I would like to mark this as Exxon Exhibit No. 7.

(Letter from Mr. Takamiya to Mr. Matters marked as Exxon Exhibit 7 for identification.)

Q. Sir, if I may, I would like to go back to January of 1980 for a moment again. That was when this changeover took place.

A. January '82.

MR. O'BRIEN: '82?

Q. January of '82?

A. Right.

Q. Did you personally have any conversation with the Arabian Marine Company concerning the changeover?

A. Yes, because at the time in return for us passing the nominations on, Arabian Marine wanted to reimburse us for expenses incurred, cables, telex expenses and things like that. We didn't want to accept any remuneration at all. It's their direct base and we didn't want to get involved at all.

The service to the customer, we continued to do that.

Q. Were you the person in contact with Arabian marine?

A. Yes.

Q. When they had a problem of collection, they would get in touch with you personally?

A. Yes.

Q. I would like to show you another document and

[Excerpt of deposition of Adam V. Rudski attached as Exhibit I to Montbach Affidavit filed 6/23/88]

A. Yes.

Q. So on October 26, Arabian did furnish the bunkers to the WILLIAM HOOPER?

A. Yes.

MR. MAVRONICOLAS: Central Gulf Exhibit 11 which is a telex dated October 3, 1983.

(Whereupon, telex dated October 3, 1983 is marked as Central Gulf Exhibit 11 for identification)

Q. You have seen this before?

A. Yes, I have seen this.

Q. Now, that's a message from who to who?

A. That's a message from Arabian Marine to Exxon International that —

Q. Attention Mr. Blank?

A. This is going to the comptroller's department and this is fundamentally an invoice for payment for deliveries made to an Exxon customer.

Q. What does — there is a handwritten note which says EIC commission in the amount of $14,424.40. What does that mean?

A. That means that Arabian Marine pays Exxon a fee for bring in the customer to the Jedda port.

Q. Do you have any documentation reflecting that arrangement?

A. Yes, there is, I believe, a contract between Arabian Marine and Exxon.

Q. Is there any percentile attached to it?

A. I think, speaking just from memory, I believe there are certain percentiles relating to certain volumes. It's not uniform.

There is a certain X number of barrels you might get such a flat fee and above that you get some kind of additional escalating fees.

MR. O'BRIEN: I call for the production of the document reflecting this arrangement between Exxon and Arabian Maritime.

Q. So that the real price of what Arabian Maritime furnished to the WILLIAM HOOPER was $749,220.20; is that right?

A. The price to Waterman was $763,000. That's the price that is published at Jedda. I believe this is 180 U.S. dollars per ton which is the published price at the time published by Arabian Marine in Jedda and that would be the price paid.

Q. All Arabian Maritime would wind up with would be $749,000?

[Excerpt of deposition of Adam V. Rudski attached as Exhibit J to Montbach Affidavit filed 6/23/88]

Q. What was the practice before 1982?

A. Practice was that Waterman vessels were supplied by Exxon using Arabian Marine Company in Jedda as our supplier.

Q. And did you take the responsibility — let me ask you the first question, who is Arabian Maritime Marine?

A. What was the name Arabian Marine? I believe it is a supplier in Jedda, Saudi Arabia. To my knowledge it is 50 percent owned or so. Maybe 49 percent by Mitsui OSK, a Japanese trading company and 50 or 51 owned by Saudi Arabian national interests.

Q. Is Mitsui your best customer in Japan?

A. He is one of our big customers, yes.

Q. Before 1982, what would be the procedure when Waterman wanted to bunker a vessel in Jedda?

A. They would place a nomination which is an order with Exxon International Company, and Exxon International would then advise Arabian Marine in Jedda and request them to bunker that vessel, whatever the volume, the date and all the pertinent information to that order.

The order would be made and Arabian Marine will send the invoice to Exxon to be paid for the delivery of bunkers, and Exxon would invoice Waterman and Waterman would pay.

Q. So that Exxon stood behind or was responsible to Arabian Marine?

MR. PARÉ: Object to the form of the question. If it calls for a legal conclusion, I am not sure I understand that.

MR. O'BRIEN: We will get to that.

Q. You can answer the question. There is nothing wrong with the form.

A. Waterman was a customer of Exxon. So Exxon would — if you are asking about credit risk, it was clearly Exxon's credit. We extended the credit to Waterman.

Q. What happened after 1982?

A. (There was no response)

Q. Or in 1982?

A. In 1982, or thereabouts, to my knowledge, prices in Jedda, some of the suppliers in Jedda were offering discount to shipping companies.

Exxon had some question as to whether this was proper to offer discounts in Saudi Arabia, and therefore, would not grant discounts to any of it's shipping customers for delivery in Saudi Arabia.

In order to allow Waterman to benefit from the lower prices which apparently were available from other suppliers in Jedda, it was agreed that Waterman would purchase directly from Arabian Marine, and pay Arabian Marine directly for the deliveries in Jedda.

Q. Arabian Marine would then send out an invoice directly to Waterman?

A. Directly to Waterman, that's correct. The orders, however, were still placed by Waterman with Exxon even for that period, because — so that Waterman can use the facility of our telex system, our computer system that would send the requests to Jedda for the information. We did this as a service to Waterman, make those communications link between Waterman and Jedda.

Q. Arabian Marine was the supplier?

A. Arabian Marine was the supplier.

Q. They billed Waterman directly?

A. They billed Waterman.

Q. And they would say to Waterman on their invoice?

A. They would presume. I have not seen what invoice from Arabian Marine to Waterman.

Q. Now, did that situation change?

A. That situation changed in approximately middle of October of 1983.

MR. MAVRONICOLAS: Mark as Central Gulf Exhibit 6 a document entitled Waterman Steamship Corporation private.

(Whereupon, document entitled Waterman Steamship Corporation, private is marked as Central Gulf Exhibit 6 for

[Excerpt of deposition of James E. Sharkey attached as Exhibit K to Montbach Affidavit filed 6/23/88]

Q. And they would telex the information to AMOCO?

A. Yes.

Q. Where would they telex it to, Jiddah or someplace else?

A. I believe it was Jiddah. Frankly, I don't specifically recall. I believe it was Jiddah.

Q. And you say immediately thereafter, a followup telex would be sent cancelling it?

A. We had, by this point in time, had the Mariner system, which was a computer nomination procedure, and the Mariner would record the original transmittal of the order to Jiddah and once it was acknowledged by AMOCO that they had received the order and, in effect, acknowledged that they were prepared to make the delivery, we would then cancel the nomination in the Mariner system so there was never any billing involved.

Q. Who entered the information to the computer, was that the order and shipping?

A. Order and shipping people.

Q. And would that computer send something to AMOCO or was it a separate telex that went to AMOCO?

A. I'm not clear on that. As I say, I have a working knowledge of the order and shipping room but I don't know the specifics. I — there was a preconceived methodology on how orders would be passed. AMOCO knew that we were placing the orders on behalf of Waterman but we were not going to be the purchaser of the product. It was a matter of communicating and that we would place the order and then cancel it.

Q. Was the Mariner system an internal Exxon system or was it hooked into AMOCO or other people world-wide?

A. No, it was an internal system.

Q. So you were cancelling the order internally so that your people — correct me if I'm wrong — would not issue an invoice to Waterman for this supposed order.

A. That's correct.

Q. And AMOCO would issue their invoice to someone?

A. Directly to Waterman.

Q. Directly to Waterman. Okay. Would you go back to Waterman at any time and tell them that everything had been placed and all was well?

A. No. As I said earlier, we only went back

[Excerpt of deposition of James E. Sharkey attached as Exhibit M to Montbach Affidavit filed 6/23/88]

your evaluation of Waterman's general condition during these meetings?

A. No.

Q. You were not worried about the fact that they may have run up a credit line with AMOCO that might impact on their ability to pay Exxon the money that was owed them?

A. Jim Sharkey, personally, did not. I had no concerns.

Q. Did others at the meeting discuss those things?

A. Not in my presence.

Q. Okay. Were you aware of what the credit arrangements, if there were any, that Waterman had with AMOCO were?

A. I knew — I learned of it long after the fact, but I was not aware of it at the time.

Q. When you say "long after the fact," you're talking after October 1983.

A. About October 1983. Within the month of October '83.

Q. How did you find out about that?

A. The Waterman people had been dealing directly with AMOCO up until the mid-part of October. And AMOCO came back to Exxon and asked us did we take a direct role in the placement of the Waterman orders.

Q. What do you mean by "direct role"? Did you talk to somebody at AMOCO?

A. No. The conversation was between a gentleman named Hakim and Mr. Matters.

Q. And how did you find out about this?

A. Since I was a salesman, I was made aware that this conversation had taken place.

Q. I'm sorry. I didn't mean to interrupt you. What was the gist of this conversation?

A. AMOCO wanted to know or actually asked Exxon to revert back to the old procedure where we physically placed the nominations and in effect accepted the credit responsibility for the payment of the oil. And we were somewhat concerned about that turn of events. It would have effectively meant that we would be taking on an added financial burden by assuming this role.

Q. You were going to guarantee the —

A. We would purchase for resale, yes.

Q. Pardon me?

A. We would have to purchase for resale, as we would in the days prior to Waterman going directly to AMOCO.

Q. When did this happen?

A. I can't be specific; but I would say it was in the very early days of October 1983.

Q. Did you make any notes with regard to this?

A. No, not that I'm aware of.

Q. Okay. Did you talk to anyone at Waterman with regard to this?

A. Oh, yes. I spoke with Bill Ryan and — let's see how to phrase it — he was aware, of course, that AMOCO were looking to have the relationship revert back to Esso, Exxon, and I had expressed to Bill that we weren't all that enthused about doing it but that we had an open mind.

Q. Now, did there come a time when a specific vessel was involved, the bunkering of a specific vessel?

A. Yes. Around mid-October, Mr. Hakim of AMOCO basically called Mr. Matters and said that the were reluctant to supply this particular ship, the Waterman vessel, in light —

Q. Do you recall what vessel it was?

[Excerpt of deposition of Adam V. Rudski attached as Exhibit N to Montbach Affidavit filed 6/23/88]

thanks. I don't know — this may be — oh, this may be initials of a vice-president of Exxon International Company, Mr. Latimer, I think. But I am not one hundred percent sure.

Q. What does it say above that?

A. (There was no response)

Q. Presentation?

A. Presentation to follow. I think this was a comment that we'll make a presentation, we, in other words, the financial department or treasurer's department to senior management as to what has happened or what the developments were with Waterman. So this is just a note that there will be presentation to follow.

Q. And you prepared this?

A. And I prepared this draft of this memorandum, yes.

Q. I notice There is a line through it.

A. That's correct, because that was a draft it has been, when the secretary retypes it, she puts the line that she has taken care of this particular page. That's her way of saying I have done it.

Q. Turn to the second page if you would. I don't believe the pages are numbered. It appears to be the second page, entitled recent developments. It starts out by saying coincidentally with the 2 Q 83 results becoming available we were approached by Arabian Maritime Operating Company, our supplier in Jedda, that they wished to revert business to Exxon. How did they approach you?

A. Over the telephone.

Q. These are the conversations that we had before, perhaps may be reflected in some notes in the commercial department.

A. Yes.

Q. Then you say, since our agreement with Arabian Marine, then I am transposing what you did, (40 percent owned by Mitsui our major Japanese customer) when they took over Waterman was on the basis that we stand behind Waterman. We agreed to take Waterman's Jedda business as of October 15, 1983.

A. Right.

Q. And you use the phrase to stand behind Waterman, right?

A. Right.

Q. What does stand behind mean?

A. Well, it meant to me that we, Waterman has been traditionally our customer for a number — as I mentioned, for 40 years and that we would not let Waterman down at this point by not accepting deliveries, especially since this agreement was made in order to provide Waterman with better prices, but they still basically remained our customer all the time.

Q. You were going to stand behind them?

A. What we had said here we would not let them go. Arabian Marine would refuse to supply them, we felt that we're not going to hang up a ship of a customer of ours for 40 years and we're going to arrange that the delivery be made on credit.

Q. Generally wasn't that the philosophy at the time that you were going to stand behind Waterman and not be the first one to possibly pull the plug on them?

A. That was the basis of the outstanding relationship, that's correct.

Q. Then turn to the third page, and then you refer to our position with regard to maritime liens may be better. Of the 2.5 million receivables about 780 thousand is on deliveries to a ship which Waterman charters from Central Gulf Lines.

A. Correct.

Q. And is that 780 thousand a reference to the WILLIAM HOOPER?

A. That is in reference to the WILLIAM HOOPER.

Q. At this time the WILLIAM HOOPER had been bunkered?

A. Correct.

Q. No doubt about it, it was clear in your mind that that ship was chartered from Central Gulf?

A. That's correct.

MR. PARÉ: At what point in time?

MR. O'BRIEN: As of December 2, 1983. He told

[Excerpt of deposition of James E. Sharkey attached as Exhibit O to Montbach Affidavit filed 6/23/88]

have no idea. It does not mean anything to me.

Q. Now, getting back to the WILLIAM HOOPER, it's your impression, sir, that a renomination was sent out sometime between October 19th and the 26th?

A. Yes.

Q. A cable. And that's what I've asked you to produce; okay?

Did you discuss the WILLIAM HOOPER with Mr. Ryan at any time during that time period?

A. In what reference?

Q. With regard to the fact whether or not Exxon was going to take the responsibility for paying for that.

A. Yes, we informed them that we would review each ship as it came up and at a point in time, I'm sure we told them we were going to supply the HOOPER. I can't be specific as to the time and place, though.

Q. Did you make any notes with regard to that?

A. No.

Q. Did you tell anyone else at Exxon that you were going to do that?

A. It wasn't a decision that I made. So it

[Excerpt of deposition of Adam V. Rudski attached as Exhibit P to Montbach Affidavit filed 6/23/88]

Sharkey that we have already entered into this, that we have reviewed it with Waterman and agreed to take some deliveries.

MR. O'BRIEN: I don't remember seeing that.

A. I may be confusing this.

MR. PARÉ: The witness is referring to Central Gulf Exhibit 6.

Q. Is Sharkey in there?

A. That was written by Jim Sharkey and documents the various visits with Waterman and the things that we were deciding or not deciding to do. But —

Q. I don't think that's the answer to my question. I can't remember my question, but I don't think that's the answer to it.

A. I think you asked — God, maybe we should start again.

(Testimony read)

Q. Now, in the last section of that memo, outlook, you again referred to the 780 thousand dollars on a delivery of a ship which Waterman chartered from Central Gulf Lines?

A. Right?

Q. That's in accordance with the prior draft memorandum?

A. That's correct.

Q. When you decided to make these standby or the one standby delivery on the WILLIAM HOOPER which concerns us, was this done on the basis that you would be directly responsible to Arabian Maritime?

A. Yes, that we would pay Arabian Maritime, Arabian Marine for those deliveries.

Q. Finally, in regard to this memorandum, there are several references to your continued efforts to obtain a letter of credit from Waterman to secure their position.

A. Yes.

Q. Let's turn to the old WILLIAM HOOPER itself, strike that old.

Before the vessel arrived in Jedda, what happened in regard to the bunkers?

A. Could you clarify that.

Q. How did the situation develop in regard to the bunkers that were being stemmed for the WILLIAM HOOPER, who placed the order, who received the orders and what was done?

A. Waterman normally placed orders with Exxon, considerable length of time ahead of the actual deliveries.

Being a liner service, buying continuously from Exxon, they would place nominations sometimes as long as a month in advance. The beginning of the month they said these are potential deliveries.

That I don't know, when that particular delivery was placed. It came through Exxon because we took all the deliveries whether they were in Jedda on behalf of Arabian Marine as I mentioned before or on our own account in other ports.

It always came through us. However, therefore, I would think that at the time this order reached Jedda, Jedda was not or Arabian Marine was not yet prepared or has not yet decided whether they would or would not supply this particular delivery directly or give it back to Exxon.

Q. They weren't clear themselves as to what arrangements they were working under then?

A. I would think so. I would think since this was a very tight schedule as you have referred, we made a delivery on the one days notice. It was a very tight schedule for them. And they probably have taken the order originally, it came through to them as being on their own account.

MR. PARÉ: Just for clarification, by them and they you mean Arabian Marine?

THE WITNESS: Yes, Arabian Marine, Arabian Marine would have thought it was for their accounts when the nomination originally reached Jedda, that I would guess that.

Q. Do you remember any messages in Exxon's file that were exchanged concerning this?

***

[Excerpt of deposition of James E. Sharkey attached as Exhibit S to Montbach Affidavit filed 6/23/88]

A. I think it was the STONEWALL JACKSON.

Q. Had you been involved with the nomination for that ship?

A. Yes.

Q. When had that taken place?

A. Waterman were of the habit of placing their nominations well in advance so that nomination could have been placed with AMOCO at least a month prior to the physical requested loading date, so I can't recall specifically when it was placed but well in advance of the loading date.

Q. And that would have followed the procedure we spoke of before, with the form having been filled out, AMOCO would have been advised by the order and shipping room —

A. Yes.

Q. — and then there would have been a cancellation on your internal —

A. Mariner system.

Q. — Mariner system. Do you have available to you today the form that you filled out with regard to the STONEWALL JACKSON for mid-October 1983?

A. I saw the form yesterday. I don't know if we have it here with us today.

[Excerpt of deposition of Adam V. Rudski attached as Exhibit W to Montbach Affidavit filed 6/23/88]

Q. And then it says that AMOCO, you have that paragraph?

A. Yes.

Q. Then it says that Exxon in view of AMOCO, and that's Arabian American Oil Companies supply direct to Waterman has agreed to take the business on a case by case basis. Is that correct?

A. That's correct.

Q. And that you would extend additional credit line of 1.5 million to 2.5 million, is that correct?

A. That's correct.

Q. How high had Waterman's previous credit line been?

A. 6 million dollars was generally Waterman's.

Q. That's a very, very generous credit line?

A. That's the credit line to meet the requirement of the company. When we had deliveries in both Jedda and in the U.S. East Coast where they would primarily buy, 6 million was what was needed to sustain the line.

It was then maintained at approximately 3 million dollars when Jedda was being supplied by Arabian Marine directly, and in this case we're referring to the fact that Jedda orders amount to anywhere between 1 and a half and two and a half million dollars a month, which would bring the line back to the five to 6 million.

* * *

thanks. I don't know -- this may be — oh, this may be initials of a vice-president of Exxon International Company, Mr. Latimer, I think. But I am not one hundred percent sure.

Q. What does it say above that?

A. (There was no response)

Q. Presentation?

A. Presentation to follow. I think this was a comment that we'll make a presentation, we, in other words, the financial department or treasurer's department to senior management as to what has happened or what the developments were with Waterman. So this is just a not that there will be presentation to follow.

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Q. I notice There is a line through it.

A. That's correct, because that was a draft and it has been, when the secretary retypes it, she puts the line that she has taken care of this particular page. That's her way of saying I have done it.

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How did they approach you?

A. Over the telephone.

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Q. Then you say, since our agreement with Arabian Marine, then I am transposing what you did, (40 percent owned by Mitsui our Major Japanese customer) when they took over Waterman was on the basis that we stand behind Waterman. We agreed to take Waterman's Jedda business as of October 15, 1983.

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A. Correct.

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A. That is in reference to the WILLIAM HOOPER.

Q. At this time the WILLIAM HOOPER had been bundered?

A. Correct.

Q. No doubt about it, it was clear in your mind that that ship was chartered from Central Gulf?

A. That's correct.

MR. PARÉ: At what point in time?

MR. O'BRIEN: As of December 2 1983. He told us already that he knew from January, 1980 the vessel was under charter.

MR. MAVRONICOLAS: Central Gulf 10, memorandum dated December 6, 1983.

(Whereupon, memorandum dated December 6, 1983 is marked as Central Gulf Exhibit 10 for identification)

Q. Now, this is another memorandum, what is the date?

A. December 6.

Q. This is prepared by you?

A. Yes.

Q. And it goes from who to who?

A. From R.J. Dupont to R.N. Dolph.

Q. Have we identified Mr. Dupont?

A. Yes, the treasurer, and Mr. Dolph is the president. In fact, it is the same memorandum, except the first one you have seen is a draft, this is the final.

Q. Turn to the second page if your would, please. Entitled recent developments?

A. Right.

Q. Is it fair to say that Arabian Maritime was no longer willing to extend credit to Waterman in view of the high exposure?

A. That's correct.

Q. And they requested you take back the direct responsibility of the Jedda deliveries which was in keeping with the original understanding between Exxon and AMOCO?

A. Yes.

Q. As I understand that arrangement, you would receive an order from Exxon and then relay it to American Arabian Maritime and they would bunker the ship?

A. Order from Waterman.

Q. You are right. You would receive an order from Waterman and then you would relay it to Arabian —

A. Marine, right.

Q. So in effect you were subcontracting the work to Arabian?

MR. PARÉ: Objection, calls for a legal conclusion.

A. I don't know the legal meaning of that. Arabian Marine is our supplier in Jedda, supplies on our behalf.

Q. You were using them?

A. Yes.

Q. You weren't furnishing the supplies yourself?

A. No.

Q. Now again, in this particular area of Arabian Marine asking you to take back the direct responsibility, is there anything apart from what you just testified, any messages which would indicate those words, direct responsibility.

A. No, not to my knowledge, no.

Q. those words are your words?

A. Those are my words.

Q. Now, turn to the next paragraph.

A. Yes.

Q. And you say accepting this proposal would lead to a high level — I am sorry, I will read the whole thing to you: Accepting this proposal (in itself a sign that a third party was losing confidence in Waterman) would have led to a level of exposure which we thought would be unacceptable in the light of Waterman's first half 1983 results; right?

A. Right.

Q. You did not want to entertain the proposal?

A. No. We were not too keen on extending additional credit to a company that was in difficulty.

Q. Understandable. So did you reject that proposal?

A. No. We did not reject the proposal outright, because we did supply maybe — we made two or three deliveries. I don't recall off-hand. I think two in Jedda in the period of October 15 and December 1.

Q. Then you go on to say, however in mid October we were abruptly informed by AMOCO that they would no longer supply Waterman.

A. That's correct.

ADDENDUM TO JEDDAH BUNKERING AGREEMENT

With reference to "Jeddah Bunkering Agreement" (dated May 1, 1977 and "Addendum to Jeddah Bunkering Agreement" dated February 12, 1981, it is this day mutually agreed between Arabian Marine Operating Company (hereinafter called Arabian Marine) and Exxon International Company (hereinafter called Exxon) that the commission payable to Exxon in the Clause "PAYMENT" be amended as follows: —

(1) Arabian Marine shall pay a commission of USD 3.40 (U.S. Dollars three and cents forty only) per metric ton in place of the old rate of 1.75 percent of invoiced product price and additional volume commission reaching maximum USD 1.25 per metric ton.

(2) The above (1) shall become effective on and after October 19, 1983 at Jeddah.

Date: December 21, 1983

Arabian Marine Operating Co. Ltd.	Exxon International Company
/s/ N. Takamiya	/s/ [Illegible]
N. Takamiya Managing Director	

[ILLEGIBLE] NOV 16 11 58 AH 83
THEMOLINE TOKYO JAPAN
ATTN: N. TAKAMIYA
GENERAL MANAGER TANKER DEPT.
MITSUI OSK LINES LTD.

THANKS YOUR TELEX DATED NOV 7, 1983. WE HOPE THE NEW ARRANGEMENT WITH WATERMAN WILL PROVE SATISFACTORY FOR ALL CONCERNED. AS AGREED WITH MR. E. HAKIM OUR NEW COMMISSION IS A FLAT 3.40/T WHICH I SUGGEST BE FORMALIZED BY A LETTER FROM ARABIAN MARINE TO MY ATTENTION AMENDING OUR EXISTING AGREEMENT EFFECTIVE DAY OCTOBER FIRST. WE ARE PLEASED TO BE ABLE TO CONTINUE TO WORK CLOSELY WITH YOU IN BOTH JEDDAH AND TO SERVE YOUR WORLDWIDE BUNKER REQUIREMENTS. IN THIS RESPECT PLEASE PERMIT ME TO SAY THAT WE ARE DOING EVERYTHING POSSIBLE TO PROVIDE COMPETITIVE PRICES AT U.S. EAST COAST ROUTE, BUT ARE NOT BEING VERY SUCCESSFUL DUE TO MARKET CONDITIONS.
WE UNDERSTAND ESSO [ILLEGIBLE] AND YOUR OFFICE ARE WORKING TO TRY TO OBTAIN SOME OF YOUR EUROPEAN VOLUME OR AT LOCATIONS WHERE WE CAN PROVIDE COMPETITIVE PRICES, QUALITY AND SERVICE. MY CURRENT PLAN IS TO VISIT TOKYO IN MID TO LATE MARCH NEXT YEAR AND I LOOK FORWARD TO SEEING YOU THEN.

WITH KIND PERSONAL REGARDS
EJ MATTERS/EXXO [ILLEGIBLE]
EXXON INTERNATIONAL CO.

[Excerpt of deposition of James E. Sharkey attached as Exhibit Z to Montbach Affidavit filed 6/23/88]

Q. Is that correct? And you were present at those meetings?

A. Yes.

Q. And what was discussed at those meetings? Let's take the November 4th meeting first.

A. Let me just read this and refresh myself.

Q. Sure.

(Witness perusing document.)

A. About this time, in this time period, we were becoming more keenly concerned about credit terms for all of our accounts and Waterman specifically. So now that we had assumed the Jiddah obligations, our exposure had been increased by upwards of over a million dollars. And as a consequence, we were making preliminary discussions with Waterman toward the notion of maybe obtaining some form of security.

We didn't specify that we, or didn't insist on anything at this stage of the game, but sort of were exploring ways of protecting our exposure, such as opening a letter of credit or prepaying some orders. But they were basically exploratory talks.

Q. Did you present Waterman with any summary

* * *

[Excerpt of deposition of James E. Sharkey attached as Exhibit AA to Montbach Affidavit filed 6/23/88]

credit ratings, they were still a sterling account as far as we were concerned. They had continually paid their bills in very timely fashion, oftentimes days before the due date.

We were concerned but we had been give verbal assurances by the Waterman management and —

Q. Who?

A. This would be Bill Ryan and the President, Ed Walsh.

Q. Assurances as to what?

A. That "We're a viable, ongoing firm; yes, we're having some problems but we have excellent banking relations with Manufacturers Hanover and they are going to see us through this crisis."

Q. So for that reason, Exxon decided to guarantee these payments to AMOCO.

A. That's correct.

Q. What did you think would have happened to Waterman if you had not —

MR. PARÉ: Objection. What he thinks would have happened as to anything is objectionable. It's speculation.

Q. Were there discussions as to what would happen to Waterman if you did not agree to guarantee

* * *

PRIVATE

WATERMAN STEAMSHIP CORPORATION

EXXON CONCERNS:

- Waterman's continued losses at increasing rate with 2nd QTR 1983 loss $13.5M and severe loss of equity.

- Amoco unwilling supply Jeddah fuel direct to Waterman. In order to avoid disruption of Waterman operations Exxon agreed on case by case basis to assume additional $1.5M/$2.5M credit exposure on these deliveries.

- Waterman's U.S. Gulf bunker fuel business has been non-profitable over last few years due to Exxon USA high cost purchases.

Above concerns triggered mutual need for Exxon/Waterman management meeting to resolve future Jeddah business and discuss Waterman's financial outlook.

MEETINGS

- October 27th (Thursday) - Exxon Treasurers (R.J. Dupont/A.V. Rudzki) met with Waterman Pres. & CEO E.P. Walsh and Sr. VP Traffic W. Ryan. Waterman presented optimistic outlook and indicated Manufacturers Hanover Bank support. Exxon accepted comments but reserved option to revert to Waterman after internal review and banking input of Waterman business line.

- November 2nd (Wednesday) - Exxon Treasurer called upon Manufacturers Hanover Bank representatives however banker representing Waterman account declined to attend meeting thus raising further Exxon concerns.

- November 4th (Friday) - Exxon Commercial Messrs. Sharp/Sharkey met with Waterman's Messrs. Walsh/Ryan to restate Exxon Treasurer's pressure for account

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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

No. 90-34

EXXON CORPORATION,

Petitioner,

—against—

CENTRAL GULF LINES, INC., *in personam*, and the M/V GREEN HARBOUR (ex WILLIAM HOOPER) *in rem*, her engines, boilers, tackle, etc. and a certain Letter of Credit No. P 621208 dated December 26, 1984 issued by the Chase Manhattan Bank, N.A., *in rem*,

Respondents.

BRIEF FOR RESPONDENTS CENTRAL GULF LINES, INC., *ET AL.*

Statement of the Case

I. The Facts:

This litigation involves a claim by Petitioner Exxon Corporation ("Exxon") for a maritime lien against Respondent Central Gulf Lines' ("Central Gulf") vessel for arranging the supply of bunkers to the vessel by a local supplier in Saudi Arabia.

Respondent Central Gulf owned the United States flag vessel M/V GREEN HARBOUR (ex. WILLIAM HOOPER) ("the HOOPER" or "the vessel") (J.A. 72), which vessel was bareboat chartered to Waterman Steamship Company

("Waterman") and used by Waterman in its common carrier service between the United States and ports in the Middle East (J.A. 72). The charter party contained a "no lien" clause. (J.A. 72).

Exxon entered into a contract with Waterman pursuant to which it was agreed that Exxon was to act as Waterman's exclusive, worldwide provider of bunker fuel oil (J.A. 20-34, 72). Pursuant to this agreement, Exxon procured fuel for vessels owned or chartered by Waterman either by supplying the fuel directly itself, or by making arrangements with local independent supplymen to have fuel supplied to vessels nominated by Waterman at ports where Exxon did not have its own fueling stations (J.A. 20, 73-74; Pet.App. A5-6; A29-30).

As contemplated by the Exxon-Waterman agreement, Exxon entered into a brokerage agreement with a local supplier in Jeddah, Saudi Arabia, Arabian Marine Operating Company ("Arabian Marine") (J.A. 73, 82-98). Under the terms of this agreement, Arabian Marine retained Exxon to "solicit and arrange" customers for the sale of marine fuels to be delivered to the customer's vessel directly by Arabian Marine. Title to the fuel was to pass directly from Arabian Marine to the receiving vessel, with Exxon receiving payment for its services from Arabian Marine in the form of a commission. (J.A. 83, 68, 70).

For the better part of 40 years, Exxon arranged for the supply of Waterman's worldwide bunkering needs pursuant to their contract (Pet.App. A4, 13, 20; J.A. 117). In order to facilitate Waterman's payment for the fuel, Exxon extended a credit line to Waterman, which credit line, at the time of the delivery at issue, had reached six million dollars (J.A. 124).

Due to certain price advantages given by local suppliers to their customers for fuel liftings in Jeddah, Exxon and Waterman agreed to Waterman's direct purchase of fuel from Arabian Marine, starting in January 1982 (J.A. 60, 63, 109). By October 1983, however, Waterman's financial situation had deteriorated and, in mid-October 1983, Arabian Marine approached Exxon with the request that Exxon guarantee payment of fuel supplies Arabian Marine delivered to Waterman vessels and revert to the Exxon-Arabian Marine agreement (J.A. 75, 101-105). Exxon agreed and took responsibility for an order previously placed by Waterman with Arabian Marine, on September 29, 1983, for a supply of fuel to be delivered to the HOOPER at Jeddah on or about October 26, 1983 (J.A. 60, 75, 119). To facilitate this lifting, Exxon increased Waterman's then existing credit line of approximately three million dollars by an additional 1.5 to 2.5 million dollars, well in excess of the cost of the anticipated Jeddah fueling (J.A. 77, 124, 135). At the same time Exxon requested that Waterman arrange for accounts receivable security with its bank (J.A. 77, 136). Shortly after the October 26, 1983 lifting, Exxon was told by Waterman that they had been unable to arrange this security (J.A. 136).

On October 31, 1983 Arabian Marine invoiced Exxon for the cost of the fuel supplied to the HOOPER, allowing a deduction for the commission earned by Exxon (J.A. 70). Exxon paid Arabian Marine the net amount and invoiced Waterman for the cost of the fuel plus commission (J.A. 69). On December 1, 1983, sought reorganization under Chapter XI of the Bankruptcy laws (J.A. 14, 77). To date, Exxon has received at least $513,485.91 in payments made by Waterman under its Chapter XI proceeding.

II. The Proceedings Below:

Exxon commenced an action *in rem* under general maritime law and the provisions of the Federal Maritime Lien Act (FMLA or Act), 46 U.S.C. § 971, *et seq.*[1] (1982), for the enforcement of alleged maritime liens for bunkers supplied in New York and Jeddah. A motion for summary judgment was made by Exxon and Central Gulf cross-moved arguing that, as a matter of law, no enforceable liens existed.

By Opinion and Order dated March 3, 1989 (Pet. App. A22-35), the District Court granted Central Gulf's motion denying Exxon a maritime lien with regard to the Jeddah delivery, on the basis that Exxon was acting as an

1 Now codified at 46 U.S.C. §§ 31301(4), 31307, 31341 and 31342.

agent for Waterman, rendering preliminary services which did not fall within the periphery of maritime jurisdiction. The District Court reasoned that no maritime lien could arise out of a non-maritime contract (Pet.App. A32), adhering to the holding in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031, *reh'g denied*, 471 U.S. 1112 (1985), and following *Minturn v. Maynard*, 58 U.S. (17 How.) 476 (1854). (Pet. App. 28). The District Court, however, did award Exxon a lien for bunkers supplied by itself at New York.

Notwithstanding the fact that the Exxon-Waterman contract was called a sale contract, the District Court interpreted it to be an agency agreement whereby Exxon would either hire itself to deliver the fuel, as they did for the New York delivery, or make arrangements with a local supplier, as they did in the case of Jeddah deliveries (Pet. App. A30-34).

Other factual findings of the District Court not contained in Petitioner's brief, but relevant to this dispute, are that: (1) as opposed to the New York delivery, Exxon never actually held title over the fuel delivered at Jeddah; (2) Exxon received payment for its services from Arabian Marine in the form of a commission deducted from its invoice to Exxon; and (3) "the locus of Exxon's relationship with Waterman was the United States, not the dock in Jeddah" (Pet.App. A30). Moreover, the District Court found that Exxon had failed to claim a lien on the ground that it advanced funds needed to fuel the vessel (Pet.App. A32) and that, even if Exxon had made such an argument, the holding in *Minturn*, *supra*, would preclude the assertion of a lien.

Upon motion for reargument, the District Court affirmed its earlier decision and, in addition, held that Exxon was only obligated to exercise its best efforts to procure fuel for Waterman (Pet.App. A8); Exxon's likelihood of profit or loss was fixed (Pet.App. A8); Exxon's performance was subject to Waterman's control, with the latter designating fuel type and quality, method, location and time of delivery (Pet. App. A10); and that Exxon's extension of credit was incidental to its long-standing agency relationship with Waterman (Pet.App. A20). The District Court, re-emphasizing the 40-

year business relationship and the preliminary character of the services rendered, again found that Exxon acted as a general agent. The District Court, declined a request that it award a lien on the basis of a distinction between general and special agency agreements, concluding that *Peralta*, *supra*, was not limited to general agency contracts (Pet.App. A12-16).

The court also rejected Exxon's claim, presented for the first time in their motion to reargue, that a lien existed due to their extension of credit to the vessel, holding that Exxon's advancing of funds was in the ordinary course of performing its long-term agency contract. (Pet.App. A20). The court reasoned that an agent, who provides preliminary services, cannot be "bootstrapped" into admiralty jurisdiction by advancing funds. (Pet.App. A19).

The Court of Appeals affirmed the lack of admiralty jurisdiction "substantially for the reasons given in Judge Connor's two thorough opinions" (Pet.App. A2).

Summary of the Argument

In urging reversal of the Judgment of the court below, Petitioner questions the validity of *Minturn v. Maynard*, *supra*, both at the time it was rendered and at the present. The *Minturn* ruling, however, was based upon sound doctrines which have remained sound, and may be even more relevant in today's commercial market. The arguments raised by Petitioner, and the Solicitor General in support of Petitioner's position, are, for the most part, based upon assumptions and neglect to recognize rules of law established as valid at the time of the *Minturn* ruling, which have remained valid to this day. In addition, Petitioner has failed to provide any supportable reason for overturning the District Court's finding that its contract was a preliminary non-maritime contract, with no juridical connection with the navigation of a vessel or direct involvement with maritime commerce.

In plain and unambiguous language, the Court in *Minturn* found a general agency contract not to be in the nature of a

maritime contract and thus not within the Court's admiralty jurisdiction. In an attempt to persuade this Court to overrule this finding, Petitioner and the Solicitor General discuss antiquated theories of maritime law, which they posit "may have" influenced the *Minturn* Court. Many of these antiquated theories were, at the time of the *Minturn* decision, already abandoned, yet Petitioner assumes that they influenced the *Minturn* decision. More logically, the *Minturn* decision was the product of the accepted doctrine that contracts preliminary to maritime contracts were not within admiralty jurisdiction, as well as the recognized presumption that a general agent, due to the nature of his relationship with the owner, relied upon the credit of that owner. Courts that have interpreted the *Minturn* doctrine over the past 135 years have confirmed this provenance and have applied it uniformly to general agency contracts. Petitioner has provided no viable reason to overturn these principles.

It is argued that, in recent years, a few courts and commentators have questioned the vitality of the *Minturn* and preliminary contract doctrines. An analysis of representative decisions in the Circuits reveals, contrary to Petitioner's contention, that there is virtual uniformity as to the continuing applicability of both the *Minturn* general agency doctrine and the preliminary contract doctrine. Those few Circuits which have carved out exceptions have limited them to agents directly involved in the operation of vessels. Rather than overturning *Minturn* and the preliminary contract doctrine, affirmance would achieve the result sought by the Solicitor General, a rationalization and continuity in admiralty jurisdiction, as well as elimination of any confusion as to the viability and meaning of *Minturn*. To do otherwise would create confusion, burdening the courts with disputes on contracts currently recognized as being outside admiralty jurisdiction.

If there is any doubt as to the vitality of the *Minturn* rule, the proper forum to address the issue is Congress. Since 1910, whenever problems regarding maritime liens have arisen, Congress has addressed them and, whenever deemed necessary, solved them by amendment to the FMLA. Each time Congress has addressed maritime liens, it has categori-

cally stated that it had no intention of changing the substantive law (other than those changes expressly made). Since 1854, the substantive law of this nation has included the *Minturn* and preliminary contract doctrines. Congress has not seen either doctrine as a problem to be addressed. It would be only logical to affirm these doctrines and leave to Congress any attempts to change them.

Petitioner's frustration with the applicability of the *Minturn* and preliminary contract doctrines to its contract does not justify judicial abandonment of those long-recognized rules of law, especially in view of Congress' silence in an area where it has affirmatively acted. Exxon should not look to this Court to protect it from what, in essence, was a bad business decision. The Judgment below should be affirmed.

I.

CONGRESS HAS SHOWN NO INTENT TO GRANT AGENTS A LIEN UNDER THE FMLA.

This Court should not, at this juncture, disturb the existing precedents and extend the reach of maritime law further than Congress has approved. Claims like those asserted by Exxon are best presented in the legislative forum. If Congress feels that denying general agents recourse to the admiralty jurisdiction of Federal courts is intolerable, it has ample power to enact a suitable solution. Congress not having done so, this Court should proceed with caution in construing statutory provisions. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971).

Article III, § 2, cl. 1, of the Constitution is the source of jurisdiction in litigation predicated upon Federal maritime law. Article III impliedly: (1) grants Congress the power to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court"; (2) empowers Federal Courts to exercise the admiralty and maritime jurisdictions to continue to develop the substantive admiralty law within constitutional limits; and (3) empowers Congress to revise and supplement the maritime law within the limits of the Consti-

tution. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1958).

Exercising its constitutional grant, Congress enacted the Federal Maritime Lien Act, 46 U.S.C. §§ 971-973, granting a lien to repair and supplymen for services rendered to vessels. This Act, first enacted in 1910, has been amended three times; in 1920, 1971 and 1988. Congress, having considered the area four times, has declined to expand admiralty jurisdiction to include general agents in the Act's list of intended beneficiaries. The Act's legislative history evidences no intent to expand maritime jurisdiction beyond the specific inclusion of towage services, which was accomplished in 1920. Where Congress, which must be presumed to be aware of existing law when it passes legislation, sets certain limits on admiralty jurisdiction, ". . . an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles v. Apex Marine Corp.*, 498 U.S. ____, 111 S. Ct. 317 (1990); *Mobil Oil Corp. v. Higginbotham Adm'x*, 436 U.S. 618 (1978). Congress' virtual preemption of this field is demonstrated by the variety of legislative enactments since 1884.[2]

The FMLA was intended to protect those suppliers of repairs, towage and other necessaries, who were unable to protect themselves properly, with the security of a lien on a vessel. Section 971 of the FMLA reads as follows:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. 46 U.S.C. § 971 (1982)

2 Rather than reiterate a listing of Congressional maritime legislation, this Court is referred to the representative sampling contained in the Solicitor General's brief at n. 15, at 22-23.

For an understanding of Congress' intent when enacting the FMLA in 1910 and the subsequent amendments of 1920, 1971 and 1988, a review of the events and case law from which the Act evolved is essential.

(A) Developments Leading to the 1910 FMLA.

[1] Early American Admiralty Jurisdiction.

Admiralty courts in this country can be traced to the beginning of the sixteenth century when local courts were dominated by colonial governors. By commission of the English High Court of Admiralty of 1691, governors were instructed to establish courts of admiralty "for the hearing and determining of all marine and other causes and matters proper to be heard therein." D. Robinson, *Admiralty and Federalism*, 70 (1970). These vice-admiralty tribunals assumed a broad jurisdiction, to the extent that the writs of prohibition of the High Court of Admiralty in England allowed, D. Robinson, *supra*, at 93. It is questionable, however, whether the jurisdiction exercised by these courts was as broad as described by Justice Story in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776):

> The commissions of the crown gave the courts, which were established, a most ample jurisdiction over all maritime contracts, and over torts and injuries, as well as in ports as upon the high seas. [Footnote omitted.] And acts of parliament enlarged, or rather recognised, this jurisdiction by giving or confirming cognizance of all seizures for contraventions of the revenue laws. The Fabius, 2 C. Rob. Adm. 245. Tested, therefore, by this exposition, the admiralty jurisdiction of the United States would be as large, as its most strenuous advocates ever contended for. *Id.* at 442.

In reality, the admiralty jurisdiction of these courts was limited because they were still controlled by the restraining statutes of Richard II and their commissions, copied from the restrictive commissions to the English Courts, D. Robinson,

supra, at 67, 76-79, 93; T. Schoenbaum, *Admiralty and Maritime Law*, §§ 1-6 (1987).

Upon this country's independence, Article III, Section 2, Clause 1 of the Constitution granted Congress the power to confer to those courts inferior to the Supreme Court "all cases of admiralty and maritime jurisdiction," which power Congress exercised in 1789 through Section 9 of the Judiciary Act, ch. 20, 1 Stat. 76, now 28 U.S.C. § 1333 (1964).

In defining admiralty jurisdiction over contracts, early American courts emphasized the substance and character of the contract or service, over the location where the contract was entered, thus departing from the English "tidewater" and "body of the county" doctrines.

At the end of the nineteenth century, it was settled that the test in matters of contract depended entirely upon the nature of the transaction, R. Hughes, *Admiralty Law*, (1901) at 17. The Court in *Insurance Company v. Dunham*, 78 U.S. (11 Wall.) 1 (1870), while following Justice Story's characterization of admiralty jurisdiction in *De Lovio v. Boit*, *supra*, reaffirmed this rule by holding:

> It thus appears that in each case the decision of the court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a *maritime contract*. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court. *Id.* at 29.) (Emphasis supplied.)

[2] Home Port Doctrine.

In an attempt to mark the periphery of maritime jurisdiction, the Court, in *The GENERAL SMITH*, 17 U.S. (4 Wheat.) 438 (1819), established the so-called "Home Port"

doctrine[3]. In this case, Justice Story held that the general maritime law afforded a lien to a party making repairs and furnishing necessaries to a vessel in a foreign port, but denied such lien protection when services were rendered in the port or state in which the vessel belonged. In the home port, the municipal laws had the power to confer a lien to supplymen for a home port vessel. The reasoning behind the "home port" rule was explained by the Court, in *The ST. JAGO DE CUBA*, 22 U.S. (9 Wheat.) 409 (1824), to be that when supplies are furnished and services are rendered in the home port, the owner is present and there is no need to pledge the credit of the vessel.

As a result of this artificial distinction between materialmen relying on the credit of the owner in the home port and the credit of the vessel in foreign ports, state legislatures moved quickly, creating liens enforceable *in rem* against domestic vessels for the breach of supply or repair contracts.[4]

Since state statutes could grant a lien for claims against a vessel whose home port was within the state, as long as the services rendered were based on a maritime contract, there resulted substantial confusion. *The ENERGIA*, 124 F. 842 (N.D. Wash. 1903); Smith, *The Confusion in the Law Relating to Materialmen's Liens on Vessels*, 21 Harv. Law Rev. 332, 343 (1908).

In an early attempt to give guidance to the courts, the Court, in 1844, exercised its recently granted power to prescribe rules of practice in admiralty[5] by issuing its Admiralty Rule 12, governing claims brought by materialmen for supplies, repairs and other necessaries, allowing either *in rem* or *in personam* actions. Sup. Ct. Adm. R. 12, 44 U.S. (3 How.) xi (1845).

Admiralty Rule 12 was more limited in scope than the rule established in *The GENERAL SMITH*, *supra*, in that it

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3 The home port rule, contained in dicta in *The GENERAL SMITH*, *supra*, was affirmed by the Court in *The PLANTER*, 32 U.S. (7 Pet.) 324 (1833).

4 S. Rep. No. 831, 61st Cong., 2d Sess. at 5 (1910).

5 Act of August 23, 1842, ch. 188, 5 Stat. 516.

referred only to those necessaries supplied by materialmen. When first issued in 1844, Rule 12 gave materialmen supplying or repairing a foreign vessel an action against the vessel *in rem*, or against the owner *in personam*. For claims arising out of services rendered to home port vessels, the materialmen were given an *in rem* action if such was provided by local statute. In 1859, the Court, in an attempt to put an end to the wide diversity of state created *in rem* liens, amended Rule 12 and gave materialmen who serviced home port vessels an action *in personam* only, thus taking away the right to proceed *in rem*, even if state statutes so provided.[6]

In 1872, the Supreme Court amended Rule 12 again, restoring the materialmen's right to proceed *in rem*. This final version of the rule read as follows:

> In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. Sup. Ct. Adm. R. 12, 80 U.S. (13 Wall.) xiv (1872).

The reason for this 1872 amendment is explained in *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874):

> As to the recent change in the admiralty rule referred to, it is sufficient to say, that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure. *Id.* at 579.

[3] Congressional Intent Upon Enactment of the 1910 FMLA.

In 1910, Congress responded to calls from the judiciary to adopt a uniform Federal law regulating the myriad of liens

6 Sup. Ct. Adm. R. 12, 62 U.S. (21 How.) iv (1859).

created by state statute.[7] In *The LOTTAWANNA*, *supra*, the Court stated:

> It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions. *Id.* at 581.

Similarly Justice Hammond in *The RAPID TRANSIT*, 11 F. 322 (W.D. Tenn. 1882), when questioning the results of the home port rule, lamented:

> I would gladly see the ancient law of the sea, that gave a lien irrespective of "home" or "foreign" ports, restored; but the power to do this is not with the courts, and the incongruities of our existing laws must be endured till congress acts. *Id.* at 330.

A proposed bill entitled, "An Act Relating to liens on vessels for repairs, supplies, or other necessaries" was drafted by a committee of the Maritime Law Association of the United States ("MLA")[8], adopted by that association and recommended by the American Bar Association. Why the FMLA was enacted and what Congress's intent was in doing so, is clearly stated in two Senate reports[9], a House Report[10], and a letter from the MLA outlining the "purpose of the bill and the circumstances which demand this legislation"[11] included in its entirety in the Senate's report.

7 Smith, *The Confusion in the Law Relating to Materialmen's liens on Vessels*, *supra*, 351-352 (1908); R. Hughes, *Admiralty Law*, 102 (1901).

8 Described in the S. Rep. No. 831, 61st Cong., 2d Sess. 5 (1910), as: "an organization composed of lawyers and other persons interested in maritime questions, including some of the federal judges."

9 S. Rep. No. 690, 61st Cong., 2d Sess. (1910); S. Rep. No. 831, 61st Cong., 2d Sess. (1910).

10 H. R. Report No. 772, 61st Cong., 2d Sess. (1910).

11 S. Rep. No. 831, 61st Cong., 2d Sess. 2 (1910).

The bill contained five sections which were, with one slight amendment, passed by Congress in 1910, Act of June 23, 1910, ch. 373, § 1, 36 Stat. 604. As pointed out by Fitz-Henry Smith, Jr., one of its drafters,[12] the bill (1) did away with the artificial home port doctrine by no longer distinguishing between foreign and domestic vessels, thus rejecting the holding in *The GENERAL SMITH*, *supra*, (Section 1); (2) removed the presumption of credit extended to the owner, (Section 1 and 4); and (3) superseded the state statutes insofar as they conferred *in rem* liens for supplies, repairs and other necessaries (Section 5).

The Senate Report described the purpose of the bill as follows:

> This bill relates to liens on vessels for repairs, supplies, or other necessaries, and is designed to remove the confusion now existing in an important branch of the admiralty jurisprudence of the United States by simplifying the law and making it uniform throughout the country. *It makes no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.*" (Emphasis added.) S. Rep. No. 690 (1910), incorporated in S. Rep. No. 831, 61 Cong., 2d Sess. 1-2 (1910).

The statute's purpose was also voiced in the MLA letter incorporated and adopted verbatim by the Senate in its Report.

> It [the legislation] makes no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes; . . . S. Rep. No. 831, 61 Cong., 2d Sess. 4 (1910).

Recognizing that the situation might arise whereby under the then existing legal principles, some creditors were not entitled to a lien on a vessel for services considered non-maritime, Congress specifically preserved the right to

12 Smith, *The New Federal Statute Relating to Liens on Vessels*, 24 Har. L. Rev. 182, at 187-188, 190 (1911); other members of the MLA Committee which drafted the bill were: Judge Frederic Dodge and Mr. Robert Hughes.

common-law remedies in Section 4 of the Act. Moreover, the MLA letter specifically referred to the fact that ". . . in providing that the right of action secured under state statutes against vessels shall be superseded, the general provision saving common-law remedies even for admiralty causes is not affected."

The only change made by the Senate in the proposed bill was the adding of the words "to be enforced by proceedings *in rem*" to Section 5, thus eliminating the possibility that:

> . . . the Act might be construed to prevent the attachment of a vessel in a suit against the owner in a state court. Needless to say it was not intended that the Act should have this effect, and it is believed that the section in question could not be construed to have any such effect. Smith, *The New Federal Statute Relating to Liens on Vessels*, 24 Har. Law Rev. at 188 (1911).

Admiralty jurisdiction, as it existed in 1910, did not include a claim arising out of the contract for services rendered and funds advanced by a general agent, *Minturn v. Maynard*, *supra*; *Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, 46 F. 397 (E.D. La. 1891), *appeal dismissed*, 159 U.S. 251 (1894); *White v. Two Hundred and Ninety-Two Thousand Three Hundred Dollars*, 19 F. 848 (E.D.N.Y. 1883). Congress did not express any intention to change this accepted rule of law.

(B) The 1920 Amendment to the FMLA

[1] Developments Leading to the FMLA 1920 Amendment.

Because the 1910 FMLA did not change the existing maritime law and did not entirely repeal state statutes, there remained at least three sources that could confer a lien to materialmen for the supply of goods and services necessary to the operation of a vessel; (1) the FMLA; (2) general maritime law; or (3) state lien statutes to the extent they were not in conflict with the FMLA. G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975), § 9-24.

As a result of the broadening of the original Act by the amendment of 1920, state statutes lost most of their importance and the Federal law was looked upon as the principal source of law for maritime contract liens. By amendment of 1920, Congress added the word "towage" to Section 1 and moved the words "other necessaries" to be read after the phrase "use of drydock or marine railway."[13] Courts took this amendment as a justification to broadly interpret the statute and construe the term "other necessaries" by analogy to include services not specified in the Act. It is doubtful, however, that the 1920 amendment should be taken as a sign of Congressional intent to expand the field of maritime liens, since the inclusion of "towage" appears to be the result of Congress' inadvertent exclusion of those services in 1910. Moreover, there is nothing in the legislative history that attaches any significance to the move of the words "other necessaries." Mattis, *Maritime Liens for "Necessaries": A Tale of Statutory Misinterpretation*, Vol. 21, No. 3, J. Mar. L. Com. 358, 359 (1990).

As pointed out in *The J. DOHERTY*, 207 F. 997 (S.D.N.Y. 1913), the Committee for the House of Representatives considered the inclusion of towage in Section 1 in 1910. This proposal was rejected however ". . . as being something foreign to the subject matter of the Act." *Id.* at 1000. Similarly, the Senate members suggested that a statement be included in their report to the effect that "towage" was covered under "necessaries." *Id.* at 1000. For reasons unknown, such statement was never included.

Following Congress' failure to include towage services in the 1910 FMLA, courts denied a lien for such services rendered. *The MONA*, 282 F. 468 (4th Cir. 1922) (decided under 1910 Act); *W. G. Coyle & Co. v. North America S.S. Corp*, 262 F. 250 (5th Cir. 1920); *The HATTERAS*, 255 F. 518 (2d Cir. 1918); *The J. DOHERTY*, *supra*.

Congress, reacting to these decisions, by amendment of 1920, Act of June 5, 1920, ch. 250, subsection P-T, 41 Stat. 1005, added towage to the list of expressly named items for

13 46 U.S.C. § 971 (1982).

which a maritime lien could be granted. The amended Act was codified as part of the Merchant Marine Act in 46 U.S.C. §§ 971-75.

[2] Congressional Intent When Amending the FMLA in 1920

Legislative history in connection with the 1920 amendment is scarce. The Congressional Record reports:

> The Senate amendment also reenacts the maritime lien Act of 1910 with the additional grant of a lien for towage in the home port of a vessel and the declaration that towage shall be presumed to be furnished upon the credit of the vessel.
>
> . . . prevents the repeal of section 4 of the maritime lien Act of 1910 in respect to the doctrines of advances and laches. Mattis, *Maritime Liens for Necessaries*, Vol 21, No. 3, J. Mar. L. Com. at 359.

The only other guidance is given by the repealing clause contained in Subsection X of the Merchant Marine Act, which provided:

> The Act entitled "An Act relating to liens for repairs, supplies, or other necessaries," approved June 23, 1910, repealed. This section, however, so far as not inconsistent with any of the provisions so repealed, shall be held a reenactment of such repealed law, and any right or obligation based upon any provision of such law and occurring prior to such repeal, may be prosecuted in the same manner and to the same effect as if the act had not been passed. Act of June 5, 1920, ch. 250, § 30, Subsection X, 41 Stat. 1005.

The lack of detailed legislative history emphasizes Congress' intent to make only a limited correctional, albeit substantive, change in the Act by adding towage services. The "most important thing about the legislative history of the 1920 Act was not what it said, but what it did not say. It did not say

there was to be any major substantive change in the law." *Mattis, Maritime Liens for "Necessaries", Id.* at 361.

The Court, in 1920, when summarizing the congressional purpose underlying the 1910 FMLA, declared that:

> The [Senate] reports expressly declare that the bill makes "no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for conflicting state statutes." *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920) at 11, 12.

The 1920 amendment caused the Act to, in large part, pre-empt state statutes and become the main source for maritime liens. There was no doubt that the FMLA had, in great part, achieved its purpose of simplifying the law.

Reviewing the then recently amended lien Act of 1920, John W. Griffin in *The Federal Maritime Lien Act*, 37 Harv. L. Rev. 15 (1924) at 23, summarized those contracts that were considered maritime at that time and stated that a general agent who advances money to a vessel, was not entitled to a maritime lien under either general maritime law or the Act.

Congress, in 1920, could have conferred a maritime lien for services rendered by general agents, but made no attempt to do so. Although the 1910 FMLA and the 1920 amendment seem to tip the balance on the scale of protection in favor of the materialmen, the statute did not affect the requirement, as established by *Minturn*, that a claim be in the nature of a maritime contract, which a general agency contract was not.

(C) The 1971 Amendment to the FMLA

[1] Developments Leading to the 1971 Amendment of the FMLA

The judicial application of the FMLA between 1920 and 1971 shows a trend of interpreting "necessaries" by analogy rather than *stricti juris*. Courts interpreted the Act to include, e.g., stevedoring liens, *The HENRY S. GROVE*, 285 F. 60 (W.D. Wash. 1922), *aff'd* on other grounds *sub nom. North*

Coast Stevedoring Co. v. United States, 17 F.2d 874 (9th Cir. 1927); and *Grays Harbor Stevedore Co. v. United States*, 298 F. 159 (D. Md. 1924); a lien for wharfage, *The LITTLE CHARLEY*, 31 F.2d 120 (D. Md. 1929); a lien for canal fees, *In re Burton S.S. Co.*, 3 F.2d 1015 (D. Mass. 1925); and a lien for winter storage of a racing yacht, *The ARTEMIS*, 53 F.2d 672 (S.D.N.Y. 1931).

By expanding the categories of "necessaries", the lower courts failed to follow the repeated warning of the Court to interpret "necessaries" *stricti juris*. See, *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923); *Vandewater v. Mills*, 60 U.S. (19 How.) 82 (1856). The Court has cautioned lower courts not to extend maritime liens by analogy, because they would thus create exceptions to the rule that all creditors have equal rights in the property of their debtor, an admonition which was followed in *The KIERSAGE*, 14 F. Cas. 466 (C.C.D. Me. 1855) (No. 7,762):

> Even when the court may be of opinion, that the law might be beneficially extended to include cases not described in its terms, it must be left to the legislative power to so extend it. *Id.* at 467.

Three years after writing the opinion on *Minturn*, Justice Grier, in *Vandewater v. Mills*, *supra*, reaffirmed the *stricti juris* doctrine, stating that a maritime lien is a privilege and, therefore, *stricti juris* and cannot be extended by construction, analogy or inference. The Court repeated this rule of construction in 1923, after the 1910 FMLA enactment and 1920 amendment, in *Osaka Shosen Kaisha*, *supra*. By not adhering to the Court's admonitions, lower courts have expanded the supplier's right to a maritime lien for "necessaries" beyond those privileges granted by Congress. As a result of the lack of due deference given to the will of the legislature and the will of the Court, courts have increased the number of liens, thus depleting the funds Congress had intended for those creditors specifically enumerated in the FMLA.

If Congress felt that there was reason to adopt the *ejusdem generis* construction of "necessaries," as developed in the

lower courts, they could have done so when amending the Act in 1971. Moreover, if Congress felt the need to create new beneficiaries, such as stevedores or general agents, they could have done so. However Congress only amended § 973 of the FMLA by striking the materialmen's duty to exercise reasonable diligence in determining whether the vessel's charterer had authority to bind the vessel. This change was instigated by the effects of the Court's decision in *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), imposing a duty to inquire into the authority of the person ordering necessaries.

[2] Congressional Intent When Amending the FMLA in 1971

The purpose of the bill to amend the FMLA, as stated by the Committee on Merchant Marine and Fisheries, was:

> . . . to protect terminal operators, ship chandlers, ship repairers, stevedores and other suppliers who in good faith furnish necessaries to a vessel. At the present time, a "prohibition of lien" clause in a charter party and the Ship Mortgage Act preclude a supplier from acquiring a lien on a vessel for necessaries furnished to the vessel. The bill would amend the Ship Mortgage Act to permit a supplier to acquire such a lien despite a "prohibition of lien" clause in the charter party. H.R. Rep. No. 92-340, 92nd Cong., 1st Sess. 1 (1971).

The Committee also clearly stated that:

> Your Committee wishes to emphasize that HR6239 makes *no change in maritime law*, the priority of maritime liens, *or in the accepted definition of necessaries.* (Emphasis supplied.) H.R. Rep. No. 92-340, 92nd Cong., 1st Sess. 3 (1971).

Although the report of the House Committee suggested that stevedore services were included in the Act and the House may have discussed such inclusion, the actual language of the Act does not add these services as a category to be

protected by a lien. Again, Congress specifically modified the Act to correct a problem they felt needed correction, in order to maintain a balance in the materialmen-vessel owner relationship. Congress did not broaden the Act to grant a lien to stevedores. Neither did Congress discuss or consider changing the judicially created rule of *Minturn*, denying a lien to a general agent, notwithstanding the fact that commentators like Gilmore and Black had already voiced their discontent with the *Minturn* holding, G. Gilmore & C. Black, *The Law on Admiralty*, (1st ed. 1957), at 24, n. 88; and notwithstanding the existence of the Fifth Circuit Court of Appeals decision in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), seemingly carving out an exception to the *Minturn* holding. See also: Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259, 274-77 (1950).

(D) 1988 Amendment of the FMLA.

While Petitioner relies on the 1971 version of the FMLA, which was in effect at the time of the Jeddah delivery, it is important to note that Congress, when again amending the FMLA in 1988, did not express any intention of expanding the specific groups of beneficiaries of the Act.

In 1984, the Court of Appeals for the Second Circuit decided *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*, specifically denying a lien to a general agent, thus continuing its "faithful adherence" to the *Minturn* holding. The Court in *Peralta* stated that *Minturn* still remained the well-settled rule excluding general agency contracts from admiralty, notwithstanding the fact that the Ninth Circuit arguably carved an exception to that rule in *Hinkins Steamship Agency v. Freighters, Inc.*, 351 F. Supp. 373 (N.D. Cal. 1972), *aff'd*, 498 F.2d 411 (9th Cir. 1974). The court in *Peralta* invited the Court to consider the general agency rule, an invitation that was declined. However, Justices Blackmun, Brennan and Marshall expressed a desire to examine the issue in light of decisions such as *Hinkins*, *supra*, and *Hadjipateras*, *supra*, and in light of questions raised by commentators. It should be noted that the dissent did not

specifically find the *Minturn* ruling to be "improper," Petitioner's contention to the contrary (Pet. Brief at 12).

In *Hinkins*, *supra*, the services of a husbanding agent, which were performed on one ship in a specific port for one call, with the agents' personnel directly supervising the services and repeatedly being in attendance onboard the vessel, were found not to be preliminary and to fall within the court's admiralty jurisdiction. Earlier, the Court of Appeals for the Fifth Circuit in *Hadjipateras*, *supra*, found a claim under a vessel management agreement to be within its admiralty jurisdiction. By doing so, the court failed to recognize the differences between a vessel management agreement and a general agency agreement, the first allowing for actual physical operation of the vessel and the second being merely preliminary to maritime activity. Nevertheless, *Hadjipateras* was looked upon by the court in *Peralta* as an exception to the general agency rule of *Minturn*. One year before Congress amended the FMLA for the third time, the Eleventh Circuit in *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660, *reh'g denied*, 820 F.2d 1231 (11th Cir. 1987), discussed the recent, seemingly conflicting holdings in *Hinkins* and *Hadjipateras*, putting both in proper prospective while reaffirming and following the *Peralta* and *Minturn* holdings.

It is appropriate to assume that elective representatives, like other citizens, know the law, *Cannon v. University of Chicago* 441 U.S. 677 (1979), and were aware of the *Peralta*, *Hinkins*, *Hadjipateras*, and *Binnings* decisions. Nevertheless, Congress did not expand the protection of the Act to include general agency contracts as an additional category of beneficiaries. Where, as here, Congress has had a recent opportunity to change the law, taking into account the case law existing at the time the statute was passed, courts should look at such enactment as a policy guideline, *Miles v. Apex Marine Corp.*, *supra*. Where Congress has acted, by defining groups of beneficiaries, only Congress should be the one to add beneficiaries, which in this instance, it did not do.

The 1988 Act is codified as 46 U.S.C. §§ 31301(4), 31307, 31341 and 31342. In Section 31301, "necessaries" are defined to include "repairs, supplies, towage, and the use of a dry

dock or marine railway; . . ." The Committee on Merchant Marine and Fisheries explains that

> . . . nor is it the Committee's intention to effect a substantive change by the failure to use the term "other necessaries" in the new definition. Particular concern was expressed over whether the provision of certain services would qualify for the status of a maritime lien. Again, *the Committee does not intend to make a substantive change* nor in any way alter the meaning of the term "other necessaries" as that term has been interpreted by the courts. (Emphasis added.) H.R. Rep. 100-918, 100th Cong., 2d Sess. 15 (1988).

The clarity of congressional intent was understood by the courts in *Peralta*, *supra*, at 800, n. 2, and *E.S. Binnings*, *supra*, at 666, and the court below (Pet.App. at 282) as being that the Act was not intended to enlarge admiralty jurisdiction to include agency contracts.

During the past eighty-one years, Congress has created the FMLA and amended it three times. Although the holding in the *Minturn* was the established general rule during this entire time (and for 56 years prior thereto), Congress has declined to change this rule of law by means of legislation. Congress cannot be presumed to have expanded the boundaries of the FMLA by its silence. However, such silence may be used to interpret Congressional intent as being to the contrary. As stated in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *reh'g denied*, 444 U.S. 889 (1979), "[t]his silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Id.* at 266-267.

Where Congress has acted, either by inclusion or exclusion of a specific group of beneficiaries, under the FMLA, only Congress can change such statute, since the power to assign a contract to either courts in admiralty or state courts, depending on whether that contract has a real and substantial relation to the conduct of the business of navigation and commerce, is left to Congress. See, Black, *Admiralty Juris-*

diction: Critique and Suggestions, 50 Colum. L. Rev. 259, 274 (1950).

II.

THE *MINTURN* DECISION AND ITS CLAIMED ANTECEDENTS.

The court below denied Exxon a lien, finding its services to be preliminary to a maritime contract, following *Peralta* and *Minturn*, where it was held that the services rendered by a general agent are preliminary to a maritime contract and contained nothing in the nature of a maritime contract. The court in *Peralta* described this rule as a "demarcation of ancient vintage" and considered itself supported in reaffirming this well settled rule by the holding in *Minturn*. *Peralta*, *supra*, at 798, 801-802 (1984).

The dispute between Exxon and Central Gulf centers around the status of Exxon when it rendered its services, what the nature of the services were and how they were executed. The court below found that Exxon's services were activities preliminary to the bunkers reaching the vessel, that Exxon's activities ceased prior to the fuel being placed onboard the vessel (Pet.App. A30), and that Exxon's long-standing relationship with Waterman was indicative of Exxon acting as a general agent (Pet.App. A12-A13). The rule of law that preliminary activities are outside of an admiralty courts' jurisdictional grant is rooted in *The THAMES*, 10 F. 848 (S.D.N.Y. 1881) and *Minturn*. In effect, Exxon is petitioning this court to overrule both cases, thus allowing all contracts preliminary to navigation and maritime commerce to come within the admiralty jurisdiction of Federal courts.

The *Minturn* decision is clear and need not be cast in a cloud of presumptive arguments about its provenance. Having available a record detailing the type of services rendered, where they were rendered, what the vessel's home port was, who its owners were and where they resided, setting forth the accounts and detailing libellant's action on a note given by one co-owner for the amount due by that owner in another proceeding, the Court in *Minturn* decided, "[t]here is nothing

in the *nature* of a maritime contract in the case" (emphasis added), and "[t]hat the money advanced and paid for respondent was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, *will not make the transaction maritime*, or give the libellant a remedy in admiralty" (emphasis added), *Minturn* at 477. The brevity of the opinion, if anything, suggests that the question presented to the Court was not overly complicated and that the answer was clear. Emphasizing this point, the Court stated, "[t]he case is too plain for argument." *Id.* at 477.

Pursuant to his agreement with the owners of the Steamer Gold Hunter, Charles Minturn provided and paid for labor used for repairs, services rendered and materials supplied to the vessel. Moreover, Minturn acted as charter broker and arranged the charter of the vessel for a voyage from San Francisco to Oregon. He expended funds for advertisements and collected and disbursed funds for the owners. He was to receive a commission for his services, *Minturn* Record at 3, 4-11, 16-17. In an effort to settle the account with one of the part-owners, Minturn accepted "a draft or bill of exchange" from that one owner for his proportionate share of that debt. When not paid on the draft, Minturn commenced a suit in District Court naming that co-owner only. That action being undetermined, Minturn subsequently commenced an action *in personam* for the full amount due against all ten owners.

Given the foregoing facts and the Court's finding, Petitioner and the Solicitor General make various speculative arguments with respect to notions of admiralty jurisdiction possibly influential in the *Minturn* Court's decision. These arguments, stemming from certain writs of prohibition of English admiralty courts, are either very unlikely to have had any bearing on the decision or were irrelevant to the question raised in *Minturn*. All of them, however, are too speculative and form no basis for reversal or limitation of the *Minturn* decision.

(A) Tidewater Limitation and the Body of the County Doctrine.

Petitioner and the Solicitor General argue that the *Minturn* decision may have been influenced by the jurisdictional principle of the tidewater limitation, as established in *The Steamboat THOMAS JEFFERSON*, 23 U.S. (10 Wheat.) 428 (1825). This doctrine, a heritage of the English writs of prohibition, restricted the jurisdiction of admiralty to those claims arising out of events occurring on waters within the reach of the ebb and flow of the tide. The Court rejected this doctrine in *The Propeller GENESEE CHIEF v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), three years prior to its ruling in *Minturn*.

As maritime commerce developed, opposition to the tidewater doctrine increased. The Judiciary Act of 1789 granted to the District Courts' admiralty jurisdiction over ". . . waters which . . . are navigable from the sea by vessels of ten or more tons burden, &c, as well as upon the high seas." Justice Grier, in an opinion written three years after *Minturn*, noted that "[b]ut this act [Judiciary Act 1789] does not confine admiralty jurisdiction to tidewaters; and if the flux and reflux of the tide be abandoned, as an arbitrary and false test of a 'navigable river,' it required no further legislation of Congress to extend it to the Mississippi, Alabama, and other great rivers, 'navigable from the sea.' " *Jackson v. The Steamboat MAGNOLIA*, 61 U.S. (20 How.) 296 (1857).[14]

Justice Grier apparently believed that the legislation did not bestow any jurisdictional power on the admiralty courts

14 Justice Grier's remark concerning legislation referred to the Act of 1845, ch. 20, 5 Stat. 726 (1845), pursuant to which Congress extended the courts' admiralty jurisdiction to:

> . . . matters of contract and tort, arising in, upon, or concerning, steamboats and other vessels . . . in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the courts in cases . . . upon the high seas, or tidewaters, . . . 5 Stat. 726 (1845).

that they did not already have, which belief evidences his expansive interpretation of admiralty jurisdiction.

In *Waring v. Clarke*, 46 U.S. (5 How.) 440 (1847), seven years before the *Minturn* decision, the Court rejected application of the English writs of prohibition as a whole to the admiralty jurisdiction of this country's courts, including the "body of the county" limitation. The Court further restated the earlier conclusion of *De Lovio v. Boit*, *supra*, that subject matter, and not locality, determines jurisdiction in cases of contract. *Waring v. Clarke*, *supra*, at 458.

The tidewater doctrine was eventually rejected by the Court in *The Propeller GENESEE CHIEF*, *supra*, involving the question whether admiralty jurisdiction was to extend to all public navigable lakes and waters beyond the reach of the tide. Seven out of the nine justices that sat on *The Propeller GENESEE CHIEF* case, including Justice Grier, were to decide *Minturn* three years later.

Although both the tidewater and body of the county doctrines were rejected by the time the Court considered the question of jurisdiction in *Minturn*, both Petitioner and the Solicitor General maintain that these doctrines influenced the Court, even though the site of the *Minturn* services was the Port of San Francisco, clearly within the reach of the ebb and flow of the tide. We have to presume that the Justices remembered their own decisions on admiralty jurisdiction. No mention was made in *Minturn* which would indicate that the court was dissatisfied with its decisions in *Waring v. Clark* or *The Propeller GENESEE CHIEF*. It is more logical to assume that the recently rejected "body of the county" and "tidewater" limitations on admiralty jurisdiction played no part in the decision making process which lead to the unanimous *Minturn* ruling.[15]

15 Little or no meaning can be derived from the fact that Justice Grier dissented in *Waring*, in light of the fact that he joined in the majority in the *Propeller GENESSEE CHIEF*, a decision which reaffirmed the majority ruling in *Waring* rejecting the body of the county doctrine. It is doubtful that Justice Grier would have been chosen to write the *Minturn* decision if he harbored the doubts Petitioner and the Solicitor General ascribe to him.

(B) Equitable Relief.

It is posited by Petitioner that the *Minturn* Court may have been influenced by the restriction that admiralty courts could not grant equitable relief and that, since the Court held that Minturn's claim was one for accounting, it would not grant such relief in admiralty. While courts in admiralty did not, at that time, have the power to grant equitable relief, they did have the power, once a contract was found to be a maritime contract, to administer relief in accordance with equity and good conscience. As explained by Justice Story, thirty-two years prior to the *Minturn* ruling, in *Andrews v. Essex Fire & Marine Ins. Co.*, 1 F. Cas. 885 (C.C.D. Mass. 1822) (No. 374), at 16-17:

> To be sure in a certain sense, and in the exercise of their general jurisdiction courts of admiralty may be properly said to be courts of equity, that is, courts proceeding *ex equo et bono*, and not confined to the narrow notions of the common law. But courts of admiralty have no general jurisdiction to administer relief as courts of equity.
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> • • •
>
> They may give the same benefit, as if there was no fraud or mistake, or omission of performance; but this can be in few cases only, which fall, in all their circumstances, completely within their general jurisdiction. Courts of admiralty, in my view, have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts.
>
> • • •
>
> But if the contract be an executed maritime contract, the jurisdiction attaches; and the admiralty may then administer relief upon that contract according to equity and good conscience.

The admiralty courts' competency to settle matters of account, where the underlying contract was found to be maritime, was also recognized in *Davis v. Child*, 7 F. Cas. 112, 116-117 (D. Me. 1840) (No. 3,628).

Assuming the Court in *Minturn* had held that the services rendered by the agent were maritime, the court could have, according to equity and good conscience, made an accounting of the balance on account.[16] Instead, the Court found that "there was nothing in the nature of a maritime contract" in the agent-owner relationship and, failing to meet this jurisdictional threshold, the proper court to administer relief in a non-maritime claim for accounting was a common law court.

(C) No Jurisdiction in Admiralty Over Claims Between Part-Owners.

Petitioner advances the argument that the *Minturn* Court may have been influenced by the notion that disputes between part-owners are not within admiralty. The validity of this argument is entirely dependent upon Minturn and his principals being co-owners of the vessel Gold Hunter, for which presumption there is no evidence in the record. To the contrary, the Supreme Court record clearly establishes that Minturn was not a part-owner.[17]

Even assuming that Minturn was a part-owner for whom equitable accounting is not available in admiralty courts, the argument does not infringe on the soundness of the *Minturn* holding. While it is correct that no equitable accounting was available to part-owners at the time of *Minturn*, *The Steamboat ORLEANS v. Phoebus*, 36 U.S. (11 Pet.) 175 (1837), this prohibition continued to be the law through the years, *The MARENGO*, 16 F. Cas. 709 (D. Mass. 1866) (No. 9,065), up to the present. *Cal Dive Int'l, Inc. v. M/V TZIMIN (ex STENA SEAHORSE)*, 743 F. Supp. 813 (S.D. Ala. 1990).

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16 Judge Brown reaffirmed this proposition in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 704-705 (5th Cir. 1961).

17 Note, *General Agency Agreements and Admiralty Jurisdiction*, 17 Conn. L. Rev. 595, 602-603, n. 31, "The libellant, Minturn, was not a co-owner. Supreme Court Record at 3, 58 U.S. (17 How.) 477 (1854)." N. 37: "Such an inquiry would have shown that Minturn was not a part-owner, see *supra* note 31 . . ."

(D) Mutual Exclusivity of Remedies and Lien Requirement for *in personam* Action.

It is argued by Petitioner that the jurisdictional doctrine of mutual exclusivity of admiralty and common law jurisdiction, reminiscent of the English writs of prohibition, may have influenced the *Minturn* court. However, this limitation was rejected by the Court prior to *Minturn*, in *Waring v. Clarke*, *supra*, where it was held, with regard to the "saving to suitors" clause in section nine of the Judiciary Act of 1789, that ". . . its meaning is, that in cases of concurrent jurisdiction in admiralty and common law, the jurisdiction in the latter is not taken away." *Id.* at 460. See, also, *De Lovio v. Boit*, *supra*. If the Court in *Minturn* had agreed with the dissenters in *Waring v. Clarke*, *supra*, arguably, they would have held that Minturn's claim was within admiralty jurisdiction, but that he had asserted that claim in the wrong court. The Court did not state that where a common law remedy existed a claimant could not assert admiralty jurisdiction. Instead, the Court unanimously held that the contract was not a maritime contract and only thereafter suggested that libellant had another remedy. As in *Minturn*, Petitioner is not left without remedy. Exxon, as any other company that arranges supplies to be delivered to a vessel by a third-party, will keep a common law remedy.[18]

Petitioner's proposition that the *Minturn* Court may have been influenced by the notion that no *in personam* lien can be asserted where an *in rem* lien is absent, is based on *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849), a case involving a claim for general average. As such it is not dispositive of the issue decided in *Minturn*, nor the case at bar.

(E) Home Port Doctrine.

It is Petitioner's contention that the doctrine established in *The GENERAL SMITH*, *supra*, that no maritime lien

18 A remedy which they have pursued, with a significant measure of success, in the Waterman Bankruptcy proceedings, having been compensated for over two-thirds of their claim.

attaches for the furnishing of supplies or repairs at the home port of the vessel, may have influenced the court in *Minturn*. This home port doctrine, however, only comes into play once a court finds that services of a maritime nature have been rendered. Since *Minturn* never passed that threshold, it was unnecessary for the Court to consider *where* the services were rendered. Moreover, if the Court had considered the home port doctrine, in deciding *Minturn*, it seems more likely that it would have made specific reference to the doctrine, as it did in contemporaneous cases. See, *The KALORAMA*, 77 U.S. (10 Wall.) 204 (1869);[19] *The LULU*, 77 U.S. (10 Wall.) 192 (1869).

(F) Narrow View of Maritime Contracts.

Contrary to the supposition of the Petitioner and the Solicitor General, at the time *Minturn* was decided the Supreme Court had already expressed the view that ". . . it was affirmed that the subject matter, and not locality, determined the jurisdiction in cases of contract" and that "[i]t was only upon the principle that the subject matter in cases of contract determined the jurisdiction, that this court decided the cases of *The AURORA*, 1 Wheat., 96, *The GENERAL SMITH*, 4 Id., 438, and *The ST. JAGO DE CUBA*, 9 Id., 409." *Waring v. Clarke*, *supra*, at 458-459 (1847). The groundwork for this conceptual rather than spatial notion of maritime contract jurisdiction was laid in 1815 by Judge Story in *De Lovio v. Boit*, *supra*, at 444, who considered maritime jurisdiction to extend to "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations), which relate to the navigation, business, or commerce of the sea."

19 This case, cited by Petitioner in support of its position, is, in fact, of little precedental value. It has never been cited by the courts or the commentators as being in derogation of the preliminary contract or *Minturn* rules, and, by its own terms, is applicable only to situations where there is sufficient affirmative evidence of a common intent on the part of the owner and agent to deal exclusively on the credit of a specific vessel. *The ALLIANCA*, 63 F. 726 (S.D.N.Y. 1894). No such affirmative evidence has been proffered in the case at bar. As such, *KALORAMA*, *supra*, is inapposite.

This "subject matter" test has been followed recently in *Kossick v. United Fruit Co.*, 365 U.S. 731, *reh'g denied*, 366 U.S. 941 (1961), and *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377 (2d Cir. 1982).

The subject matter test, well developed at the time of the *Minturn* decision, would logically have influenced the *Minturn* Court's determination of whether libellant's services were rendered pursuant to a maritime contract, rather than the locality test. While we do not know what was in the *Minturn* Court's mind at the time of the decision, the result, when applying the subject matter test is the same as would have been reached applying the locality test; under both tests the services were preliminary to maritime commerce and navigation. This is equally true in the case at bar.

(G) Jurisdiction Dependent on Surrender of Note.

Again, Petitioner advances the speculative argument that the fact that Minturn did not surrender a bill of exchange may have influenced the Court in denying maritime jurisdiction. The record, however, shows that the arrangement by which Minturn received a bill of exchange was between Minturn and co-owner Grant only (Supreme Court Record at 22, 2310). The common law action commenced by Minturn on that note named Grant as the sole defendant and was limited to the balance due by him. The action commenced by Minturn in admiralty named all ten co-owners as defendants. While the failure to surrender the note could have influenced the Court with respect to libellant's action against defendant Grant, for his proportionate share, it should have had no bearing on the action against the remaining nine owners.

III.

THE COURTS' APPROACH TO GENERAL AGENCY CONTRACTS AFTER *MINTURN*.

The propositions advanced by Petitioner, and partly joined by the Solicitor General, ask this Court to venture on a search for the, supposedly existing, hidden reasons behind the

Minturn decision. Instead of dissecting this decision, it is far more relevant to determine how the courts, after *Minturn*, have interpreted its holding and how its legal premise was used and developed by the courts. A review of relevant cases that either directly relied upon the *Minturn* holding or that have applied the rule of law that a general agency agreement is preliminary to a maritime contract shows that, with the exception of the Fifth and Ninth Circuit, which have carved out exceptions for those agents directly involved with the operation of the vessel, all Circuits addressing the question are in agreement with and have followed the established rule that general agents do not need the extra protection of a maritime lien. This review is indicative of the strong support for the continued viability of the *Minturn* ruling and exclusion of general agency contracts from admiralty jurisdiction in the Circuits.

(A) The General Agency Rule in the Circuits.

[1] The First Circuit.

In *The M. VIVIAN PIERCE*, 48 F.2d 644 (D. Mass. 1931) a managing agent of a steamship company advanced funds for the payment of the crew's wages. The court found that "[t]he established rule is that a general agent does not have a maritime lien for advances which he makes on behalf of vessels belonging to his principal during his agency," *Id.* at 645., and accepted as the reasoning behind this rule that ". . . the presumption that in such [general agency] cases the advance or the payment is made on the credit of the owner, not of the vessel." *Id.* at 645.

More recently, the First Circuit in *Medina v. Marvirazon Compania Naviera, S.A.*, 709 F.2d 124 (1st Cir. 1983), denied a lien to a managing agent who advanced funds to pay wages of the crew and stated that the law was well settled in that one who advances funds used to discharge seamen's wage liens is subrogated to the lienor's rights, with the exception of "owners, general agents, and, in limited circumstances, shareholders or officers of a corporate owner . . ." *Id.* at 125. See also, *Inversiones Calmar, S.A. v. C.E. Heath*

& Co., 681 F. Supp. 100, 104 (D.P.R. 1988) ("The plain rule of *Minturn v. Maynard* [citation omitted], reiterated in *Kossick*, 365 U.S. 731, 81 S. Ct. 886 is that preliminary contracts are not maritime").

[2] The Second Circuit.

The Second Circuit's leading cases on the issue of services preliminary to maritime contracts are the case at bar and *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*. In *Peralta*, the Second Circuit was asked to abandon "the long standing rule that suits upon general agency contracts are not within the jurisdiction of the silver oar," *Id.* at 798-799, which exception the Court refused to discard, notwithstanding their questioning its continued necessity.

In *Peralta*, plaintiff was hired as a husbanding agent for several vessels calling on various ports, and arranged for the delivery of fuel, water, provisions, repairs, custom clearance and stevedoring. In doing so, the agent advanced certain funds, which remained outstanding and for which balance they sought an accounting.

Recognizing that special deference should be given to prior rulings, the court recited the rule of law distinguishing between preliminary services leading to a maritime contract and such contracts themselves, as set forth in *The THAMES*, 10 F. 848 (S.D.N.Y. 1881).[20] The court then confirmed that the general agency exclusion of *Minturn* agreed with the preliminary services rule. The court noted the faithful adherence of the Second Circuit to the *Minturn* holding in prior cases, citing *Cory Bros. & Co. v. United States*, 51 F.2d 1010 (2d Cir. 1931) and *Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir. 1936), modified in other reports *sub nom.*, *Admiral Oriental Line v. Atlantic Gulf & Oriental S.S. Co.*,

20 This preliminary services doctrine did not originate with *The THAMES*, *supra*, but had antecedents dating back, at least, to 1822. *Andrews v. Essex Fire & Marine Ins. Co.*, *supra*, at 16. ("Courts of admiralty . . . have jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts.")

88 F.2d 26 (2d Cir. 1937) (denying a maritime lien to a ship's agent who advanced funds in defense of an action by a third-party against the owners).

It is said that the Court of Appeals in *Cory Bros. & Co. v. United States*, *supra*, for the first time intertwined the general agency doctrine with the preliminary contract doctrine. In doing so, the court cited the seminal language in *The THAMES*, *supra*, calling for the exclusion of preliminary contracts from maritime jurisdiction and stated, "[a]pparently the same ground explains the decision in *Minturn v. Maynard* [cite omitted]" and that, "[i]t is difficult, if not impossible, to distinguish *Minturn v. Maynard* from the case at bar, and that decision would seem to be a controlling authority against admiralty jurisdiction of the present suit." *Id.* at 1012.

That the general agency exclusion follows from the doctrine that preliminary contracts are not within maritime jurisdiction, was followed in *Ingersoll Milling Machine Co. v. M/V BODENA*, 829 F.2d 293 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988), and by the District Court in the case at bar, where the general agency rule was referred to as a "subset" of the preliminary contract rule (Pet.App. A16). In the case at bar, following *Peralta*, the court described the scope of the *Peralta* rule as limited to the proposition that preliminary contracts, in particular general agency contracts, are outside the limits of admiralty jurisdiction (Pet.App. A32). The court held that a "continuing relationship is particularly significant in maritime law, since a business relationship of substantial duration suggests an absence of reliance on the vessel's credit . . ." (Pet.App. A12) and recognized the fact that Exxon was Waterman's sole procurer of bunkers for forty years.

[3] The Third Circuit.

The Court of Appeals for the Third Circuit, in the *The MARET*, 145 F.2d 431 (3d Cir. 1944), was asked to consider the claim of a general agent who arranged for and advanced funds for supplies delivered to the vessel in one particular

port. With respect to the advances of the agent to a local supplier, the court held that:

> . . . it is clear that Amtorg was purporting to act as the general agent for the Maret under the direction of Sovfracht. The Maritime Lien Acts did not change the general maritime law. . . . It has been repeatedly held that a general agent cannot obtain a maritime lien. [Citations omitted.] *Id.* at 443.

More recently, the Third Circuit in *Bermuda Express, N.V. v. M/V LITSA (ex. LAURIE U)*, 872 F.2d 554 (3d Cir. 1989), demonstrated again that it was in line with the other Circuits with respect to the preliminary services rule.

[4] The Fourth Circuit.

Shortly after the passage of the 1910 FMLA and the 1920 amendment, the Court of Appeals for the Fourth Circuit was presented with the question of whether a "general agent, as such, in the admiralty, [has] the right to a lien for payments made by it in due course of its business?" *The CENTAURUS*, 291 F. 751 (4th Cir. 1923). In this case, an agent had advanced payment for supplies, provisions, fuel and stores it had caused to be furnished to The CENTAURUS as well as for a large number of other vessels owned by its principal. The court held the agent to be a general agent and answered the above question in the negative:

> The general rule that such lien does not exist under the laws of the United States is too well settled to admit to serious controversy. A case may be found here and there to give color to this contention, but the great weight of authority is to the contrary. There are no facts here taking the case out of the general rule. *Minturn v. Maynard. et al.* [citations omitted]. *Id.* at 813.

Moreover, the court noted that the then newly enacted FMLA did not support the agent's claim for a maritime lien. *Id.* at 814. The Fourth Circuit reaffirmed *The CENTAURUS* holding shortly thereafter in *The HOXIE*, 297 F. 189 (4th Cir. 1924).

In 1961, the Fourth Circuit gave a more reasoned explanation, similar to the ones given by other Circuits, as to why general agency contracts were not considered maritime, in *Savas v. Maria Trading Corp.*, 285 F.2d 336 (4th Cir. 1960). The plaintiff in *Savas* was employed with a New York company that acted as general agent for the vessel. Plaintiff was instructed to supervise the repair of the vessel in Bremen, Germany and to do whatever was necessary to have the vessel put in seaworthy condition. The District Court had held that plaintiff was acting as the owner's representative. The Court of Appeals, affirming, explained that although the FMLA provides a lien for those who furnish repairs or supplies to a vessel, the established rule is that a general agent is not entitled to such lien, "the theory being that he acts not as a stranger relying on the security of the vessel but as an agent of the owner to whom he looks for payment [citations omitted]." *Id.* at 339.

Again, this Circuit applied the general agency rule, rooted in *Minturn*, without criticism and confirmed the sound reasoning of the exception.

[5] The Fifth Circuit.

While the Fifth Circuit has recognized a distinction between special and general agents, a distinction rejected in the Second Circuit, they have joined the other Circuits in denying a lien to general agents, on the presumption that general agents are not strangers to the vessel.

In 1932, the Fifth Circuit Court of Appeals, in *Galatis v. Galatis*, 55 F.2d 571 (5th Cir. 1932), restated the established rule that general agents were not entitled to a lien for advances and were bound to look alone to the owners employing them. The Fifth Circuit has continuously adhered to this exclusion of general agency agreements from admiralty jurisdiction, and as recently as 1990, Judge Brown, sitting by designation, denied a claim for advances of funds for land based services rendered to a vessel stating, "[o]wners

(including part-owners and stockholders) are not entitled to a lien for advances, nor is the . . . sort of agent who qualifies as a 'general agent.' " *Cal Dive Int'l, Inc. v. M/V TZIMIN (ex STENA SEAHORSE)*, *supra* at 818.[21]

The Fifth Circuit has, however, developed a distinction between an operating agent and a general agent. In *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), the Fifth Circuit Court of Appeals affirmed a lower court decision that had held that a dispute arising out of a management contract was within its admiralty jurisdiction. The operating company was to "operate the vessel, obtain freight or freight engagements, collect the freight monies and, after deducting all operating expenses, remit the balance to the owners." Id. at 700.[22]

The Circuit Court found that the purpose of such a management contract was to "effectuate the physical, economic operation and employment of a vessel" (*Id.* at 703), and gave as its "closest example" to the *Hadjipateras* fact pattern *United Fruit Co. v. United States Shipping Bd. Merchant Fleet Corp.*, 42 F.2d 222 (D. Mass. 1930), a case which also involved a vessel management agreement (*Hadjipateras*, *Id.* at 703, n. 14). In *United Fruit*, *supra*, the court explained that the agreement to operate the vessel was similar to a charter party and, therefore, there existed "a direct relation to a ship engaged in commerce on navigable waters." 42 F.2d at 225.

Whereas the Fifth Circuit has continued to distinguish between management agents and general agents on the basis that a management agent is presumed to rely on the credit of the vessel, it continues to recognize that a general agent is presumed to rely solely on the credit of the owner and is not entitled to a lien. See, e.g., *First Nat'l Bank of Jefferson*

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21 Interestingly, Judge Brown quotes Gilmore and Black in support of this proposition, *supra*.

22 Contrary to Petitioner's statement that the agent in *Hadjipateras* and *Minturn* provided the same services, it should be noted that *Minturn* was not a managing agent. In fact, the record in *Minturn* shows that the vessel was engaged by the direction of the owners. *Minturn* Record at 3.

Parish v. M/V LIGHTNING POWER, 851 F.2d 1543 (5th Cir. 1988).

[6] The Sixth Circuit.

The Sixth Circuit, in an early case, conformed to the then settled rule that general agents were not entitled to a maritime lien. In *Dike v. The ST. JOSEPH*, 21 F. Cas. 175 (D.C. Mich. 1869) (No. 12,229), the District Court held that maritime liens take priority over mortgagee's claim, but found that one of the claimants, being part-owner, general agent and superintendent, was not entitled to a maritime lien. Claimant held sixty-thousand dollars worth of stock in the company and was found not to be entitled to any of the proceeds of the sale of the vessel since he was regarded as having given credit to the owners and not to the vessel.

[7] The Seventh, Eighth and Tenth Circuits.

These Circuits appear not to have addressed the issue of a general agent's right to a maritime lien.

[8] The Ninth Circuit.

The Ninth Circuit Court of Appeals recently addressed the issue of jurisdiction of Federal courts in connection with *in rem* actions, in *Melwire Trading Co. v. M/V CAPE ANTIBES*, 811 F.2d 1271 (9th Cir. 1987), where the Court reaffirmed the *stricti juris* doctrine. In so doing, the Circuit Court stated:

> A maritime action *in rem* has traditionally been available only in connection with a maritime lien. Claims not creating a maritime lien must be pursued *in personam*. *The Resolute*, 168 U.S. 437, 440-42, 18 S.Ct. 112, 113-14, 42 L.Ed. 533 (1897). Maritime liens must be construed "*stricti juris*, and cannot be extended by construction, analogy, or inference." *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 499, 43 S.Ct. 172, 174, 67 L.Ed. 364 (1923). Consequently, "[t]he only liens recognized today are those cre-

ated by statute and those historically recognized in maritime law." *In re Admiralty Lines, Ltd.*, 280 F.Supp. 601, 604-05 (E.D.La. 1968), *aff'd mem.*, 410 F.2d 398 (5th Cir. 1969). *Id.* at 1273.

The Ninth Circuit Court of Appeals has, however, granted lien status to a local husbanding agent. *Hinkins Steamship Agency v. Freighters, Inc.*, *supra*. In this case, without using the specific terminology, the Ninth Circuit Court of Appeals seems to have adopted the special versus general agency theory, leaving intact the general premise that where there is a continued relationship between the agent and the principal, the agent's services are presumed to have been rendered on the credit of the owner. The *Hinkins* case involved a local husbanding agent who, upon request of the vessel's managing agent, procured services for and supervised one particular vessel for one call in the port of Baltimore. The services provided included dockage, pilotage, tug assisting, cleaning of fuel tanks and holds and furnishing of supplies, *Hinkins*, 351 F. Supp. at 374. The Court of Appeals distinguished the case from the *Minturn* because *Minturn* ". . . involved general continuing agency agreements," 498 F.2d at 412, whereas the services rendered by the plaintiff were not part of a continuing relationship between Hinkins and the operating agent. Moreover, the facts indicate that Hinkins was a sub-operating agent for that one particular port, vessel and call, and directly supervised and often attended the services rendered. These "distinguishing facts were . . . sufficient to take this contract out of the 'preliminary' or 'shoreside' category and put it within the maritime jurisdiction." 351 F. Supp. at 376. The court's conclusion to grant a lien based on these considerations does not disagree with *Minturn* or with any of the decisions in the other Circuits that are based on the closeness of the relationship between agent and principal.

[9] The Eleventh Circuit.

The Eleventh Circuit's position with regard to the rights of a general agent have recently been clearly stated in *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, *supra*. In this case, the

owner of the vessel had entered into an agency contract with a New York based steamship agent which was to act as general agent servicing the owners' vessels in the U.S. Gulf ports. The contract permitted the general agent to enter into contracts with sub-general agents, which they did with Binnings, for the Gulf. Binnings solicited cargo, provided documentation and financial services and general husbanding services. The Court of Appeals reversed a District Court holding that had granted Binnings a maritime lien, on the basis that the services provided were of the type traditionally held not to give rise to a maritime contract, because they are preliminary to services leading to maritime contracts. The Circuit Court felt guided by the "relatively clear line of demarcation" that the preliminary contract rule provides for drawing the boundaries of admiralty contract jurisdiction. Citing from *The THAMES*, *supra*, the Circuit Court stated:

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have [sic] been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, [one cannot] perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed. 815 F.2d at 663.

To date, the quoted reasoning of *The THAMES* has been followed on a wide scale.[23]

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Second Circuit: *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*; *Boyd, Weir & Sewell, Inc. v. Fritzen-Halcyon Lijn, Inc.*, 709 F. Supp. 77 (S.D.N.Y. 1989)

Fourth Circuit: *Outbound Maritime Corp. v. P.T. Indonesian Consortium*, 582 F. Supp. 1136, 1141 (D. Md. 1984)

The court in *Binnings*, after citing *Peralta*, *supra*, and *Minturn* with approval, and having distinguished both *Hadjipateras*, *supra*, and *Hinkins*, *supra*, concluded that:

> Binnings' agreement does not involve management and operation of NSCSA vessels. It is merely an agency agreement providing for the performance of services that no doubt facilitate maritime activity but, under long-standing precedent, are not sufficiently related to actual maritime activity to support admiralty jurisdiction. *Id.* at 664.

The services performed by Exxon, while undoubtedly helpful to Waterman, likewise were not related to actual maritime activity.

(B) Summary of Principles Adhered to by the Circuits.

The review of relevant cases decided in the Circuits clearly shows that over the past 135 years virtually every Circuit has abided by the rule established in *Minturn*. Whether or not the antecedents of the *Minturn* decision remain valid, the courts of this nation have used the *Minturn* decision as a guiding tool to reach a just result: to distinguish those preliminary services which are not sufficiently related to actual maritime activity to support maritime jurisdiction from those services that are. The Circuits have followed the reasoning that a claimant's entitlement to the extra security of a secret lien on a vessel should depend on the claimant's reliance on the credit of that vessel. If he is a stranger to the vessel, dealing with the vessel on a short-term basis and involved with the actual supply of necessaries or repairs, he may have relied on

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Fifth Circuit:	*European-American Banking Corp. v. M/V Rosaria*, 486 F. Supp. 245, 255 (S.D. Miss. 1979)
Seventh Circuit:	*The CITY OF CLARKSVILLE*, 94 F. Rep. 201, 205, (D.C. Ind. 1899)
Ninth Circuit:	*The RUPERT CITY*, 213 F. Rep. 263, 273 (W.D. Wash. 1914)
	Taylor, et al. v. Weir, 110 F. Rep. 1005 (D.C. Or. 1901)
Eleventh Circuit:	*E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, *supra*

the vessel's credit. However, if the claimant had a continuing relationship with the owner of the vessel; dealt primarily with the owner when providing his services and making financial arrangements; was aware of the financial reliability of the owner; and had no direct involvement in the operation and management of the vessel, then the claimant is presumed to have relied upon the credit of the owner and is not entitled to a lien.

(C) Application of these Legal Principles to Services Rendered by Exxon.

When applying the legal principles of the *Minturn* decision, as developed by the courts, one should look at the nature of the services involved, the subject matter of the contract, *Insurance Co. v. Dunham*, *supra* at 29, and the way the contract was executed. Pursuant to a forty year contractual relationship with Waterman, Exxon procured bunkers to be delivered to vessels nominated by Waterman. For forty years Exxon dealt with Waterman, made financial arrangements with Waterman and shortly before the October 26, 1983 Jeddah lifting, increased the then existing credit line with an amount well in excess of the cost of the bunkers to be supplied at Jeddah (J.A. 77, 124, 135). Exxon, having been informed of Waterman's declining financial situation by the local supplier,[24] required its principal to give extra security for Exxon's business risk by requiring that it make arrangements for accounts receivable security with its bank (J.A. 77, 136). Furthermore, Exxon maintained the practice of not arresting customers' vessels (J.A. 80-81). Although the District Court found the existence of a long-standing relationship between Exxon (Pet. App. A13) and considered that long-standing agency relationship as indicative of a general agency (Pet. App. A13), it never made a determination on whether or not Exxon relied solely on the credit of Waterman. Moreover, the question of Petitioner's reliance was never presented

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24 Even without being so informed, Exxon certainly had the capacity to determine a contract partner's financial viability on its own and, in fact, was well aware of Waterman's financial status through its own sources.

to this Court. Therefore, Petitioner's and Solicitor General's suggestion that this Court resolve this case without remanding the matter to the District Court for further determination is improper. The credit issue was not presented to this Court in the Petition for Certiorari; did not receive full briefing; was not decided by the District or Circuit Courts, and is not necessary to the disposition of the case. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443-444 (1989); Supreme Court Rule 14(a).

As stated by Judge Conner in his initial opinion (Pet.App. A30) and reiterated in his opinion upon rehearing (Pet.App. A56), Exxon's role in the Jeddah bunkering transaction was "shoreside" and only preliminary to a contract relating directly to maritime commerce. Despite Petitioner's conclusory statement that "[i]t is difficult to think of a contract more intimately related to maritime commerce than the fuel supply contract in question" (Pet. Brief, at 9), a review of the provisions of that contract confirms, not only that it is not a maritime contract, but that Exxon, in drafting its form agreement, purposefully distanced itself from any involvement with a vessel's navigation, in particular, or with maritime commerce, in general.

Exxon's primary obligation, under the agreement, was to procure marine fuel suppliers for Waterman nominated vessels worldwide. Having done so, with regard to a particular port, Exxon affirmatively excluded itself from any further involvement with the physical delivery of the fuel (except in instances where it supplied the fuel itself). Once Waterman had provided Exxon with seven (7) days notice of an anticipated delivery (¶ E, J.A. 26), all further specifics concerning the delivery, such as exact quantity required, and exact location and time at which delivery was required, had to be transmitted to the supplying company, not Exxon. Any amendments to these specifics were to be transmitted only to the supplying company and Waterman was solely responsible for failure to do so (J.A. 27). Exxon had no obligation with regard to the mechanics of the fueling (J.A. 27) and, in fact, specifically denied any obligation to make any delivery if the

supplying company had insufficient fuel available at the port of delivery (J.A. 27).

Furthermore, pursuant to the Exxon-Waterman contract, Exxon did not deliver the fuel[25] (Clause 3.1, J.A. 21); had no involvement in establishing the price for the fuel (Clause 4.1, J.A. 21); had no liability for demurrage or other losses incurred during loading (Clause 6.1 and 6.5, J.A. 22, 23); had no responsibility for obtaining required delivery permits (Clause 6.2, J.A. 22); had no involvement in determining the exact quantity delivered or the quality thereof (¶ A, J.A. 24), and declined primary responsibility for any oil spills during delivery (¶ F, J.A. 27, 28).

Even applying the most liberal of standards to this procurement agreement, the nature of Exxon's services were clearly preliminary to the maritime contract between Waterman and Arabian Marine and did not have any involvement in the navigation of the vessel or direct juridical connection with maritime commerce—Exxon's sole role was administrative. As such, Exxon's general agency agreement with Waterman falls within the established rule of law excluding preliminary contracts and well outside any definition of a maritime contract.

IV.

REVERSAL OF *MINTURN* WILL NOT ENHANCE STABILITY NOR WILL IT PROMOTE MARITIME COMMERCE.

Petitioner and the Solicitor General request the reversal of the *Minturn* decision and the rejection of the preliminary contract exclusion. While the exclusion of general agents as a group has been criticized by recent commentators, the courts have adhered to it as being the established rule, at times carving out an exception for those agents who are not general or husbanding agents, but instead, operational or management

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25 In addition, pursuant to the Exxon-Arabian Marine agreement, Exxon was specifically excluded from the chain of title to the fuel (J.A. 84).

agents. Reversal of *Minturn* would topple the case law developed over the past 135 years and open the admiralty courts to other contract "anomalies" that have consistently been considered to be non-maritime. An updated version of the enumeration of preliminary contracts in *The THAMES*, *supra*, at 801-802, would include "charter party broker,[26] freight broker,[27] vessel construction contract,[28] and the attorney who provides legal services to avoid the arrest of the vessel.[29] All these contracts include services without which the vessel's capacity to participate in maritime commerce would be hampered. If the standard becomes that all "anomalies" or legal fictions with respect to maritime liens be abolished, whether or not they provided practical rules the industry lives by, a reversal of *Minturn* will have a much more radical effect than suggested by Petitioner and the Solicitor General.

Although not without criticism similar to the criticism cited by Petitioner, it is a well established rule of law that no maritime lien attaches for services rendered pursuant to a contract to build a vessel. This rule dates back to 1857 when the same Court[30] that decided *Minturn*, settled the question whether admiralty jurisdiction extended over a contract to construct the hull of a vessel. *People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857). The Court decided that it did not. One can hardly think of a contract more related to the maritime commerce than one to build that industry's vehicle itself. The *People's Ferry* decision, however, has been upheld for over 130 years. Undoubtedly, Petitioner's arguments against *Minturn* could be similarly made in favor of extending admiralty jurisdiction to shipbuilding contracts, or for that matter, any preliminary contract that has a tangential

26 *Minturn v. Maynard*, 58 U.S. (17 How.) 476 (1854).

27 *The Harvey & Henry*, 86 F. 656 (2d Cir. 1898).

28 *People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857).

29 Mattis, *Maritime Liens for "Necessaries": A Tale of Statutory Misinterpretation*, Vol. 21, No. 3, Mar. L. Com., at 392, n. 400.

30 Chief Justice Taney, having been indisposed, did not sit in this case.

relation to the navigation of vessels or maritime commerce. If *Minturn* is reversed to allow a lien to a general agent, nothing should stand in the way of reversing *People's Ferry Co.*, *supra*.

Preliminary services rendered as an aid to maritime commerce do not make them "necessary" or "indispensable." If Exxon had refused to guarantee payment to the local supplier, other options remained open to Waterman to ensure its vessel stayed in the stream of commerce. Waterman could have gone to another supplier or paid the local supplier at the time of purchase.

There is no Federal interest compelling admiralty jurisdiction over contractual disputes involving preliminary services. Moreover, allowing maritime liens to those rendering preliminary services would authorize a vastly greater number of claimants to arrest vessels which will, in fact, impede maritime commerce instead of promoting it, thus defying the Constitutional purpose of the Admiralty grant to Federal courts.[31]

Granting maritime jurisdiction to providers of preliminary services will create additional secret liens for the owner who charters his vessel and who may not be involved in the operation of the vessel to contend with. Because of this secret nature, the scope of transactions giving rise to maritime liens should be narrowly construed. *Todd Shipyards Corp. v. The CITY OF ATHENS*, 83 F. Supp. 67 (D. Md. 1949), *aff'd*, 177 F.2d 961 (4th Cir. 1949).

Due to the conceptual origin of liens lying in the personification of the ship itself, the lien constitutes an interest in the *res* and will follow the vessel when sold. Therefore, the creation of secret liens on the vessel for all manner of preliminary services, not directly related to the navigation of the vessel, can seriously burden the innocent purchaser. Canada and

31 In this respect, it is difficult to understand the government's position in the case at bar, in that they, as shipper, owner and operator, would not benefit from the creation of a new *in rem* action. In contrast to *Sisson v. Ruby*, 497 U.S. _____, 110 S. Ct. 2892 (1990), where the government took a more understandable restrictive view on admiralty jurisdiction, its position seeking to expand admiralty jurisdiction herein seems anomalous.

England, both sea-faring jurisdictions, have avoided this problem by enacting statutory *in rem* actions for services rendered to the vessel instead of secret liens. In both jurisdictions, the *in rem* action is extinguished when the vessel is sold. Petitioner has not presented any compelling reason why this Court should not affirm the *Minturn* rule in order to prevent an increase in unwarranted secret liens.

CONCLUSION

The Judgment of the Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

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